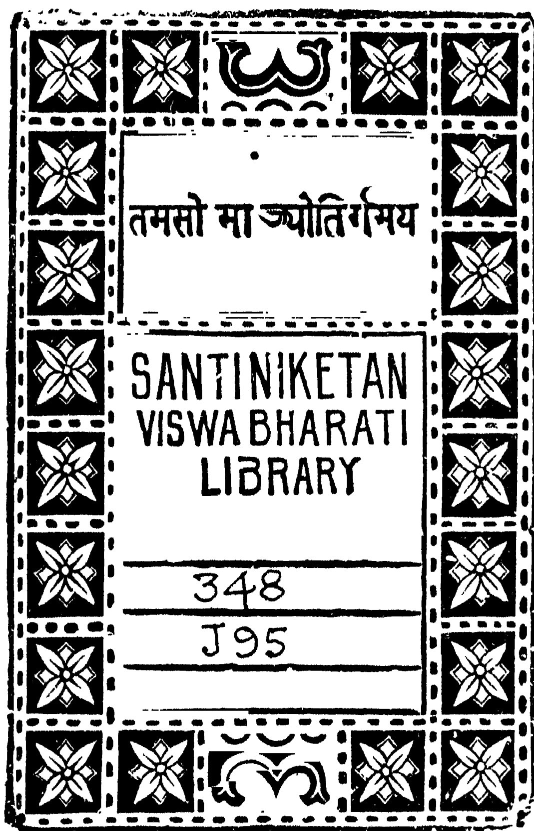


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A Dissertation

ON

THE MUSLIM LAW OF MARRIAGE

COMPILED FROM

THE ORIGINAL ARABIC AUTHORITIES

PRECEDED BY A COMPARATIVE AND DESCRIPTIVE INTRODUCTION

BY

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PREFACE.

The principles of Muslim Law contained in these pages are drawn mainly from the original Arabic authorities. I take the liberty to differ from some observations of such eminent writers of Muhammadan Law as Baillie, Macnaghten and Mr. Ameer Ali, and also from some judicial decisions of the Indian High Courts; for this I crave indulgence. I hope the work will meet with the approval of those interested in the Muslim Jurisprudence.

M. U.

Law Department,
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March 17th, 1926

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MARRIAGE.

MARRIAGE.

The development of the institution of marriage is a matter of historical interest. It originated in the form of irregular unions and marital unions.[1] Marriage by capture was the primitive form of marriage, and ultimately it gave way to elopement with consent, "a compromise with real capture." The institution of marriage by purchase gradually grew up, and this notion of acquisition of a wife, as property, paved the way for marriage by agreement, subject to a dowry. Polyandry, polygamy and even monogamy were enjoined by immemorial customs, and practised in different parts of the world. It is difficult to ascertain whether cognatic or agnatic unions, exogamy or endogamy were preferred by the ancient people. The ancient totemic system was helpful in regulating the sacredness and continuance of the marriage tie. The transition from the sacramental indissolubility of marriage to the treatment of marriage, as a civil institution is a modern idea.[2] According to Mclennan and Morgan the inauguration of the matriarchal system in early stage seems to be natural; but Westermarck and A. Lang hold that the highest state was patriarchal. The "Cyclopæan family" was ever maintained under the despotic sway of the sire over his wife and children.

Whether the Arabian civilisation in its natural growth passed through these various stages is a matter of speculation and conjecture for the historians. We have insufficient materials at our disposal for proper investigation. It requires an effort of the imagination to describe the Arabian Society of fifteen hundred years ago. The advent of the great Prophet of Islam marked a triumphant period, the old political and social structure of the Arabian culture tottered down, and was replaced by a refined civilisation, which is the ideal of the Muslims and the admiration of the world. The Arabs themselves refer to the pre-Islamic era as the days of ignorance (ایام جاھلیت), i.e. "period of ignorance or rather wildness or savagery, in antithesis to the moral reasonableness of a civilised man" [3]

1. *"Marital unions are the outcome of sexual selection and restrictions" Vinogradoff Historical Jurisprudence Vol. I. P. 167.*
2. *"In civil society it becomes a civil contract regulated and prescribed by law" Story conflict of laws P. 143.*
3. *Nicholson's 'Literary History of the Arabs' P. 30.*

ANCIENT ARABIA.

The Arabs were divided into tribes, sub-tribes, and families. A number of tribes joined together on a federal basis for the purposes of common offence and defence. The Beduins of the desert were subordinate to the heads of their family, and were in alliance with one of the principal tribes. The ancient Arabian nomadic confederation was based upon a quasi-contract, as the result of association of various tribes; there was no state in the modern sense, or a settled form of Government for the administration of justice, order and peace.

The elected chief of a tribe in consultation with the heads of the family, and assisted by the moral force of tribal opinion, discharged his duties and functions. The Government was constructed on customary usages, and the administration was carried on according to ancient customs. The tribal council did not make laws but applied and upheld the immemorial customs. "The evolution of private law out of the state would be a contradiction of all history." The punishments were severe, to cut off the hands of thieves, to stone adulterers and adulteresses, and to demand blood-money, as compensation for minor injuries. For offences committed by a member of one tribe against another, the usual procedure, to adjudge the truth and falsehood of the allegations, was to solemnly administer the sacred oath in the Hatim (حطیم) of the Kabah.

These immemorial usages and customs form an integral part of the history of Muslim Jurisprudence. The Islamic laws did not profess to establish a new system of administration of justice. Islam only repealed such customary laws of Arabia, as were inconsistent with the principles of sound reason and good conscience.

Muslim Jurists fully recognised the force and validity of customs. The Author of Fatawa Kazi Khan Observes.

"That which is established by custom is also regarded as established by the law."	وانما ينظر الى المتعارف لان الثابت عرفا کا لثابت شرعا -

Custom (Urf, Taamul, Adat, عرف - تعامل - عادة) is an important source of law. It is laid down in the Hedaya.

"Custom does not command any spiritual authority like Ijma (اجماع) of the learned; but a transaction sanctioned by custom is legally operative, even if it be in violation of a rule of law derived from analogy, it must not however be opposed to a clear text of the Koran or of an authentic tradition."

The Muslim Jurists hold that customary law was the result of the uniformity of practice, and it ranked as "positive morality", until it had been sanctioned by the state, or received the approval of the "Kazi." A custom which is immemorial, continuous, certain reasonable and consistent with the Koranic injunctions would always be upheld. They maintain that the Holy Koran and the commands of the Prophet abrogated many ancient customs. Austin remarks "that acts of Parliament often abolished customs." The Great Roman Jurists held a contrary view, while recognising the force of custom, they held that customs could abrogate law.

Just. Lib. I. Tit. 2. 9.

"The unwritten law is that which usage has approved: for ancient customs, when approved by consent of those who follow them are like Statute."

"Ex non scripto jus venit, quod usus comprobavit. Nam diutunri mores consensu utentium comprobati legem imitantur."

Lib. I. Tit. 2. 11.

"But the Municipal laws of every state are subject to frequent changes, either by the tacit consent of the people, or by a new law being subsequently passed."

"Ea vero, quae ipsa sibi quaeque civitas constituit saepe mutari solent vel tacitu consensu populi vel alia postea lege lata."

"Custom of long standing is not unreasonably observed as law........ For what does it matter whether the people declares its will by vote, or by acts and conduct?"

"Inveterata consuetudo pro lege non immerito custoditur............ Nam quid interest, populus suffragio voluntatem suam declaret, an rebus ipsis et factis." (D. 1. 3. 32.)

Savigny held a similar view "that custom has legal force as a manifestation of the "Inner consciousness" of the people. "Our common law" said Blackstone "depends upon custom introduced by the voluntary consent of the people."

During the pre-Islamic era the customs regulating marriage or the relation of the sexes, and the legal status of the issues born of such unions were vague and indefinite. It appears that polyandry, polygamy, marriage by capture, illicit connections, temporary marriages, and consecutive divorces were all common among the ancient Arabs.

Polyandry.

Polyandry is an old institution and according to McLennan and Morgan, it is a natural stage in the development of society.

The various tribes of Tibet, and of the Himalayan regions, the Todas, the Nairs, the Australian aborigines and other barbarous tribes have practised it. In India, we find that "Fraternal Polyandry" was common. It was permissible for several brothers to have a single woman as wife, and the issues born were assigned out of respect to the elder brother. Such an institution was tolerated simply "as an expression of fraternal benevolence." Polyandry was generally prevalent in the form of communal marriage, where one or more women were set apart as the common property of the tribe, as such was the custom in Australia among the Dieri and kindred tribes. The system of polyandry which was prevalent in ancient Arabia stands on a different basis. It was in the nature of a legalised customary joint concubinage.

Sahih Bukhari, a book of the traditions universally revered by the Muslims of the world, as well as Abu Daud report two famous Hadises about the existence of a peculiar system of polyandry in ancient Arabia.

1. "A number of men not more than ten used to cohabit with a woman. When she conceived and was delivered of a child, then she would send for all these men, who were bound to attend, She told them 'You remember our agreement, now I have brought forth a child and I am of opinion that this child is so and so's issue.' The named father had to recognise the paternity."

١ يجتمع الرهط دون العشرة فيدخلون على المرأة كلهم نصيبها فاذا حملت وضعت ووليال بعدان تضع حملها ارسلت اليهم فلم يستطع رجل منهم ان يمتنع حتى يجتمعوا عندها فتقول لهم قد عرفتم الذي كان من اركم قد ولدت وهو ابنك يا فلان .فتسمى من احببت منهم باسمه فيلحق به ولدها ـ

2. "Many men used to have sexual intercourse with a woman, who would not refuse any visitors. When such a woman had an issue born to her, then her 'frequent" visitors would assemble, and by physiognomistic test used to decide, who was the father of the child."

٢ يجتمع الناس الكثير فيدخلون على المراة لاتمتنع ممن جاءها وهن البغايا كن ينصبن علي ابوابهن رايات تكن علماً لمن ارادهن دخل عليهن فاذاحملت فوضعت حملها جمعوا لها و دعوا لهم القافة ثمه الحقوا ولدها بالذي يرون فالتاطه ودعي ابنه ـ

The Prophet of Islam abolished the institution of polyandry, and forbade such practices.

The custom of polyandry was the result of poverty, and excess of the male population due to the large number of female infanticides, mostly found in less fertile lands. The Arabian desert was an ideal place, for its poverty was proverbial, and female infanticide was enjoined by custom as obligatory.

Professor Robertson Smith remarks that in Arabia, " infanticide was as natural as it was to other savage peoples in the hard struggle for life."[1] Indeed it was considered meritorious and generous to bury a female child. The Holy Koran refers to this barbarous custom in an admonishing tone.

Part. XIV. ch. XVI.

" When a daughter is born to one of them (ancient Arabs), then his face becomes clouded, and he is full of rage."

واذا بشر احدهم بالانثي ظل وجهه مسوداً وهو كظيم

" He hides himself from the people because of the evil tiding given to him. Shall he retain it with disgrace or bury it in the dust? Evil is it indeed, which they decide."

يتواري من القوم من سوء مابشر به يمسكه على هون ام يدسه في التراب الاساء ما يحكمون

" And they ascribe daughters to Allah. Praise be to him. But for themselves they would have what they wish for."

ويجعلون لله البنات سبحنه ولهم ما يشتهون .

Various reasons are given to account for female infanticide. The important considerations are.

Hardships of travel and trouble in rearing children on account of poverty. Charlevoix observes. " That the Abipones seldom rear but one child of each sex, murdering the rest till the eldest are strong enough to walk alone. They think to justify this cruelty by saying that, as they are almost constantly travelling from one place to another, it is impossible for them to take care of more infants than two at a time, one to be caried by the father and the other by the mother."[2]

Restrictions on husbands from cohabitation during the suckling period as being injurious to the health of the infant.

Supernatural superstitions enjoined by local custom as in China. The Hakkas, a Mongolian tribe, frequently killed their girls with a view to induce the soul to appear the next time as a boy.

Westermarck observes that "among a great number of uncivilised peoples it is usual to kill an infant if it is a bastard, or if its mother dies, or if it is deformed or diseased, or if there is anything unusual or uncanny about it, or if it for some reason or other is regarded as an unlucky child."[3] It is reported that twins were destroyed on the assumption

1. *Kinship P. 294.* 2. *History of Paraguay I, 405.*
3. *The origin and development of the moral ideas Vol I, 394.*

that this indicated unfaithfulness on the part of the mother, while children born with teeth or during stormy weather were usually put to death.

In Sparta infanticide was sanctioned by law; and it was customary to dispose of by exposure deformed or sickly infants. Aristotle observes "Nothing imperfect or maimed shall be brought up", and in fact he desired to restrict the influx of population by providing "If any woman be pregnant after she has produced the prescribed number, (regulated by the state) an abortion shall be procured before the fetus has life." (Politicia)

At Rome the philosopher Seneca writes; "We destroy monstrous births, and we also drown our children if they are born weakly or unnaturally formed."

It is not surprising to find infanticide prevalent among the ancient Arabs. The historical incident of Osaim Fazarite who nursed his only child a daughter named Lacita by concealing her from his people is cited, as an example of paternal benevolence.

The Holy Prophet condemned infanticide, and put an end to this corrupt practice. The Koran proclaims.

Part. XV. ch. XVII.

" Slay not your children on account of the dread of poverty. We will provide for them. To slay them is a great sin."

ولا تقتلوا اولادكم خشية املاق - نحن نرزقهم واياكم - ان قتلهم كان خطأ كبيراً -

Bukhari and Abu Daud record the existence of a peculiar institution prevalent in ancient Arabia to obtain "a goodly seed"

"A custom was that a husband would say to his wife after the termination of her monthly courses, "send for such a man and have intercourse with him," and the husband would keep away from her, until she had conceived by that man, and thereafter would return to her. This was done with a view to obtain a noble seed."

كان الرجل يقول لامرته اذا طهرت من طمثها ارسل الي فلان فاستبضعي منه ويعتزلها زوجها ولا يمسها ابداً حتى يتبين حملها من ذالك الرجل الذى تستبضع منه فاذاتبين حملها اصابها زوجهاان احب وان يفعل ذالك رغبة فى نجابة الولد فكان هذا النكاح سمي نكاح الاستبضاع -

This institution was common among the ancient Arabs, and was put to an end after the dawn of Islam, as being nothing short of permissible fornication and adultery. The Koran says.

Part. XXV. ch. VII.

" And go not near adultery, it is a foul deed and an evil path."

ولا تقربوا الزنى انه كان فاحشة وساء سبيلاً -

It is curious that a parallel system was in existence in India called Niyoga, though now obsolete, it was recognised by the laws of Manu for the Sudras.

IX. 59.

"On failure of issue (by her husband) a woman who has been authorised, may obtain, (in the) proper (manner prescribed) the desired offspring by (cohabitation with) a brother-in-law or a Sapinda."

देवराद्वा सपिण्डाद्वा ।
स्त्रिया सम्यङ्नियुक्तया ॥
प्रजेप्सिताधिगन्तव्या ।
संतानस्य परिक्षये ॥

The Hindus sanctioned Niyoga, as it was necessary far a Hindu, to have a son to perform the sacred rites. It is suggested, that among the Semites a similar notion, that the dead man will miss something, if he leaves no children to worship, had survived. Apparently this was not the sole reason. The Arabs desired to obtain a noble seed, a gifted child with natural attriubtes of heredity, and this is far from being a desire to have a son to perform the sacred rites. It is strange that Plato was of a similar opinion. In Greece he said " Every individual is bound to provide for a continuance of representations to succeed himself as ministers of the divinity."[1]

The present essayist's private enquiries at Mecca, when he performed the Haj,[2] revealed that the ancient Arabs practised wife-lending as a form of hospitality. A similar institution is still prevalent among the Tibetans.

Adoption, as prevalent in the Roman and Hindu law, was also in vogue in ancient Arabia, as a legitimate mode of affiliation. The Tafsir Ahmadi states that adoption was not restricted by any condition, as to the age or the absence of a natural son. The adopted son assumed the family name of the adopter, and enjoyed the same legal status as a natural sons. It is alleged that a woman could not adopt at all. The Hindu law allows a woman to adopt a son to her husband; but not to herself, while the Roman law in special cases allowed the women to adopt.

Just Inst. Lib. I. Tit. XI. 10.

"Women also cannot adopt; but by imperial clemency they can adopt to console them, for the loss of their children."

Feminae quoque adoptare non possunt,..sed ex indulgentia principis ad solatium liberorum amissorum adoptare possunt.

The Roman law was very strict, and made ample provisons for the benefit of the adopted child, safeguarding his right of inheritance even

1. *Plato, leges, vi. 773.*

2. *in 1922*

in his natural father's property. We cannot say with certainty what was the legal status of an adopted child in ancient Arabia.

Islam does not recognise the institution of adoption. The Prophet of God contracted a marriage with Zainab after her divorce by Zaid. Zaid belonged to the tribe of Kalb, and was a slave of the lady Khadiga, the prophet's first wife. The Holy prophet liberated Zaid, and had married him to his cousin Zainab. The marriage had proved unhappy, and the Prophet's efforts for a reconcilation were in vain. Zaid on account of his great attachment to the Prophet was called a "son of Mahomed." The Holy Koran refers to this incident.

Part. XXII. ch. XXXIII.

واذ تقول للذي انعم‌الله عليه وانعمت عليه امسك عليك زوجك واتق الله وتخفي فى نفسك ما الله مبديه و تخشى الناس - والله احق ان تخشه فلما قضي زيد منها وطراً زوجنكها لكي لا يكون على المؤمنين حرج فى ازواج ادعيائهم اذا قضوا منهن وطراً وكان امرالله مفعولاً ـ

"And when you said to him (Zaid) whom Allah had shown favour and you have favoured "keep your wife to yourself and fear Allah;" but you concealed in your heart what Allah would disclose, and you feared men while Allah wsa worthier to feared be, therefore, when Zaid had accomplished his want of her. We gave her to you, as a wife so that there should be no difficulty for the believers to marry the wives of their adopted sons when they have divorced them, and Allah's command shall be performed."

The only form of filiation which the law takes cognisance of is termed "Ikrar اقرار or acknowledgment. Under the Sunni law the father alone can acknowledge under the following conditions.

(1) The acknowledgee must be of such an age as to admit the possibility of the relation of parent and child to each other.

(2) The parentage of the acknowledged person must be unknown.

(3) The child should assent to the fact of acknowledgment.

Marriage by Capture.

In archaic times marriage by capture was exceedingly prevalent, by parting the bride's hair with a spear, and lifting her over the threshold, or carrying her away by force. "The rape of the Sabine women" and the Tartar raids in the Caucasus are well known. The pursuits by the parents and relatives of the damsel were generally unsuccessful, and in cases of elopement with the consent of parents such pursuits were held only for enjoyment. Similarly the ancient Arabs prided themselves upon capturing maidens. Professor Robertson Smith observes "according to Ibn Abd Rabbih the hajin, that is the son of an 'ajamiya' or non-

Arab woman, did not inherit in the Times of Ignorance; but there was no such disability as regards the son of a captive, nay, according to Arab tradition the best and stoutest sons are born of reluctant wives."[1] Indeed the Arab maidens preferred being carried away with their consent, as it manifested their paramours intense love and affection.

Sir Walter Scott depicts an interesting episode.

"LOCHINWAR."

"She is won! we are gone! over bank, bush, and scaur—
They'll have fleet steeds that follow," quoth young Lochinwar.

× × × ×

"There was racing and chasing on Cannobie Lee,
But the lost bride of Netherby nee'r did they see.
So daring in love, and so dauntless in war,
Have ye e'er heard of gallant like young Lochinwar?"

The Hindu Law recognises, marriage by forcible capture as "Rakshasa rite" and attaches no insignificance to such an institution. The laws of Manu specially enacted.

iii. 33.

"The forcible abduction of a maiden from her home, while she cries and weeps after (her kinsmen) have been slain or wounded and (their houses) broken up is called the Rakshasa rite."

हत्वा छित्वा च भित्वा च क्रोशंतीं रुदतीं गृहात् ।
प्रसह्य कन्याहरणं राक्षसो विधिरुच्यते ॥

In ancient India the Asura form of marriage (i. e., by purchase) was held lawful. It is still common among the Sudras and the Vaisyas. The laws of Manu forbid such unions.

iii. 51.

"No father who knows (the law) must take even the smallest gratuity for his daughter."

न कन्यायाः पिता विद्वान्गृह्णीयाच्छुल्कमण्वपि ।

ix. 98.

"Even a Sudra ought not to take a nuptial fee, when he gives away his daughter; for he who takes a fee sells his daughter, covering (the transaction by another name)."

आददीत न शूद्रोऽपि शुल्कं दुहितरन्ददन्
शुल्कं हि गृह्णकुरुते छन्नं दुहितृविक्रयं ॥

Similarly the ancient Greeks used to buy wives, and later its reverse the dowry system was inaugrated, as a mark of distinction between a wife and a concubine.

At Rome the Plebian institution, of marriage "Co-emptio in Manu" was a fictitious sale "per aes et libram." Dr. Hunter suggests that

1. *Kinship P 73.*

fittest survived. The ancient Arabs cannot boast of a Family System like the Nairs of India. Among the Nairs the mother holds real property, and the inheritance passes through her. An Arab was never wholly subordinate to his wife in political or domestic affairs. But the crude civilisation, that permitted a woman to have sexual intercourse with any number of men, and on the birth of a child granted to her the supreme power to assign it to any of her paramours, who could not refuse under any circumstances, illustrate that the females played a predominant part in social relations.

A peculiar custom which was prevalent in the days of Ignorance confirms this view. Professor Robertson Smith says. "The women in the Jahiliya, or some of them, had the right to dismiss their husbands, and the form of dismissal was this. If they lived in a tent, they turned it, round, so that if the door faced east it now faced west, and when the man saw this he knew that he was dismissed."[1] According to the traditional custom a man had no right to enter the tent of his unwilling wife. The tent was understood to be her exclusive home, hence the husband was subordinate to her in family affairs.[2]

Schoolcraft mentions a similar custom among the North American Indians, " the lodge itself with all its arrangements is the precinct of the rule and Government of the wife......The husband has no voice in this matter."[3]

Professor Vinogradoff observes that in analysing the conflict between the Patriarchal and Matriarchal system. "The important question is that of residence and whether the household is within the circle of influence of the wife's or the husband's family."[4]

So long as "the tent" of an Arabian woman was situated in the neighbourhood, of her relations, she was able to check the growth of her husband's supremacy, interference and domination. But the moment she elected to live in the company of her husband's tribe, she naturally lost her independence, and thus unconsciously surrenderred herself to the control of her husband. Among the Nairs of India the definite element of male influence is represented by wife's brother, who successfully resists any encroachment attempted by the husband, on the wife's ancient customary rights and privileges. But the Matriarchal system is loosely knitted, and in the long run the ultimate triumph of the more solid and single Patriarchal organisation was inevitable.

1. *Kinship P. 65.*
2. *Men were afraid of their women " with their sly philters and maleficient drinks "Doughty Arabia Deserta 11-384.*
3. *Indian in his Wigwam, P. 73.*
4. *Historical Jurisprudence, I. P. 196.*

The natural conditions in Arabia only hastened that fall. The ancient Arabs themselves soon came to regard women, as subject of inheritance like ordinary family goods. Tafsir Ahmadi refers to an archaic custom of and heirs inheriting step mother's, as wives by simply throwing a sheet of cloth on each of the widows.

"During the time of Ignorance if a man died and left widow's step-sons and relatives, then if either of them throw a sheet of cloth over a widow, she immediately became his wife though unwilling, and the same former dower was fixed again."

تفسير احمدي

ان في الجاهلية لمامات الرجل
وترک امرآة وابدامن غيرها واقاربه
يالقي ذالک الابن اوالاقارب وقت
وفات ذالک الرجل ثوباً عليها فلزوجوها
اكراها وقرر وامهرها على ماقرر موثهم ۔ •

The Holy Koran emphatically denounced the custom of taking women as wives against their wishes.

Part. VI. ch. IV.

"Oh believers! It is not lawful for you that you should take women as heritage against their will."

يايها الذين امنوا لا يحل لكم ان
ترثوا النساء كرهاً ۔

In Arabia the process of the subjection of the women and children was totally complete before the dawn of Islam, and the endeavours of the prophet of God were to emancipate the woman from hereditary bondage, restore her position, and give her a legal status in the eye of the law.

The Fatawa-i-Alamgiri and The Siraj-ul-wahaj sum up thus:

"Marriage legalizes the mutual enjoyment of the parties in a manner permitted by law, thus says the Fath-el-kadir. It subjects the wife to the power of restraint, that is it prevents her from going out and showing herself in public. It imposes on the husband the obligation of dower, of maintaining and clothing her. It establishes on both sides the prohibition of affinity and the right of inheritance. It obliges the husband to be just between his wives, and to have due regard to their respective rights. It imposes on the wives the duty of obedience, when called to the martial couch, and confers on the husband the right of correction, when they are disobedient, and he is enjoined to treat them with courtesy and kindness. It makes it illegal to marry two Sisters at the same time, or any others who stand on the same footing."

(عالمكيري)

السراج الوهاج ۔

اما احكامه فحل استمتاع كل منهما
بالا خرعلي الوجه الماذون فيه شرعاً
كذافي الفتح القدير وملک الحبس
وهي صيرورتها ممنوعة عن الخروج و
البروزو و جوب المهرو النفقة اوالكسوة
عليه وحرمت المصاهرت و الارث من
الجانبين و وجوب العدل بين النساء
وحقوقهن و وجوب أطاعته عليها
اذا دعاها الي الفراش وولاية تاديبها
اذالم قطعه يان نشزت واستحباب معا
شرتها بالمعروف هكذا فى البحر الرايق ۔
و تحريم الجمع بين الاختين و من في
معنا هما كذافي السراج الوهاج ۔

It is said that a people's civilisation may be measured by the position held by its women. The Muslim law fully recognises the legal status of women, but additional privileges are granted to men due to their greater responsibilities.

The Holy Koran Says. Part. Y. ch. IV.

" Men are the maintainers of women, because Allah hath exalted some of them over others, and because they spend their wealth for them. So virtuous women should be obedient, and guard their private parts by the protection of Allah."

الرجال قوامون علي النساء بما
فضل الله بعضهم على بعض و بما انفقوا
من اموالهم فالصالحت قانتت حفظت
للغيب بما حفظ الله .

All religions seem to have tolerated the predominace of the male over the female. The laws of Manu, Deuteronomy and the Church alike upheld and advocated it. The Lord said to the woman. "Thy desire shall be to thy husband and he shall rule over thee" (Genesis iii. 16).

"Man is not of the woman; but the woman of the man. Neither was the man created for the women; but the women for the man. (Corinthians, XI. 8) As the church is subject unto Christ so let the wives be to their own husbands in every thing." (Ephesians V. 23.)

Donaldson writes, "In the first three centuries I have not been able to see that Christianity had any favourable effect on the position of women, but on the contrary, it tended to lower their character and contract the range of their activity."[1]

The condition of the woman was in no way better in ancient Greece. She was held in bondage to her husband. Aristotle observes "A good and perfect wife ought to be mistress of everything within the house, ...the wife ought to show herself even more obedient to the rein than if she had entered the house as a purchased slave. For she has been bought at a high price, for the sake of sharing life and bearing children, than which no higher or holier tie can possibly exist." (Œconomica I, 7).

The Zoroastrian Yasts likewise defines a holy woman as "rich in good thoughts, good words and good deeds, well principled and obedient to her husband." (XXII. 18).

Similarly the laws of Manu declared.

ix. 3.

" Her father protects (her) in childhood, her husband protects (her) in youth, and her sons protect (her) in old age, a woman is never fit for independence."

पिता रक्षति कौमारे भर्ता रक्षति यौवने ।
रक्षन्ति स्थाविरे पुत्रा न स्त्री स्वातन्त्र्यम-
र्हति ॥

1. *Contemporary Review, lvi. 433.*

And further the sacred code enunciates the sole object for which God created women.

ix. 27.

"The production of children, the nurture of those born, and the daily life of men, (of these matters) woman is visibly the cause."	उत्पादनमपत्यस्य जातस्य परिपालनम् ॥ प्रत्यहं लोकयात्रायाः प्रत्य क्षं स्त्रीनिबधनम् ॥

The rights and liberties of the females were not only trampled upon, but a notion grew up that they could, neither inherit land, nor hold it as their property, and this seems to be a universal custom. The Norse law while holding men and women equal as regards inheriting "movable money," (losore) did not allow the women to inherit land. The women were excluded by the Frankish and Lombard law. Lex Angliorum et Werinorum enacted "that inheritance in land goes with the duty of taking revenge for the slaying of relatives and with the power of bearing arms."

The Hindu law also excluded the women. Similarly the ancient Arabs, laboured under a customary usage that the land is reserved for the warrior. "None shall inherit but he who smites with the spear."

They held further that the females were themselves divisible like property, the sons and heirs were entitled to inherit their relations' and father's widows, and there were other customs which contributed to the degradation of the women. The recognition that they were not free agents to marriage and their consent or refusal was immaterial; the deprivation of their right to dower and its appropriation by their relations; the institution of repeated divorces and repudiations at intervals, and their cancellation at will and pleasure of their husbands; the adoption of a system of regular confinement for one whole year to mourn their husbands death; the severe punishment which was inflicted upon them, if proved to have committed adultery; such were only glaring instances of their deplorable and deteriorated status in life.

The Prophet of Islam entirely altered such practices, and the Koran forbade such barbaric usages. The Muslim law holds that a woman is a free agent in marriage, that her consent is essential to validate the marriage contract. Fatawa Kazi Khan boldly states.

"One of the conditions of marriage is the consent of the woman, when she has attained puberty, whether she be a virgin or married syeeba (widow). The guardian has no authority of compelling her to marry (Hanifi law)."	فتاوي قاضي خان و من شرائط النكاح رضاء المراة اذ كانت بالغة بكرا كانت او ثيبة فلا يملك الوالي اجبارها علي النكاح عندنا -

The Prophet forbade the old institutions of repeated divorces, disapproved of Ila and Zihar, and prescribed the recognised modes of Talak-us-Sunnat.

The maximum period of mourning called Iddat was fixed at 4 months and ten days.

"Iddat is not more than 4 months and 10 days, whereas, in time of ignorance it was a complete year."

يقول لاثم قال انماهي اربعة اشهر
وعشر وقد كانت احدلكن في الجاهلية.

The law of inheritance as amended by the Koran was enunciated.

Part. IV. Ch. IV..

"Men shall have a portion of what the parents and the near relatives leave, and the women shall have a portion of what the parents and near relatives leave, be it a little or much, it being a fixed portion."

للرجال نصيب مما ترك الوالدان
والاقربون وللنساء نصيب مما ترك
الوالدان والاقربون مما قل منه اوكثر
نصيبا مفروضاً.

The ancient customs and usages relating to adultery were greatly modified. The old custom sanctioned that the adulteresses should be stoned, and unchastity on her part made her liable to the forfeiture of her dower. The Holy Prophet of God restored absolute equality between husband and wife, and demanded the testimony of four witnesses to prove adultery, or instead the procedure of reciprocally making the "Lian," swearing and impricating upon them the curse of God with a view to establish their innocence, was made known.

The Muslim law inflicts the heavy punishment of 100 stripes for the commission of the offence of adultery; but it is due to the fundamental conception that marriage is sacred, and God ordained that men and women should guard their private parts.

Similarly the Hindu law regarding the marriage tie as sacred provided a severe punishment for adultery.

VIII. 359.

"A man who is not a Brahmana, ought to suffer death for adultery (Samgrahana)."

अब्राह्मण ; सङ्ग्रहणे प्राणान्तन्दण्डमर्हति ॥

In China, adultery in a woman is regarded as the vilest crime and the guilty wife is oftentimes "cut into small pieces."

According to Hebrew law adultery by a married woman was considered as a capital offence (Deuteronomy XXII 22.)

The Prophet while ordering the wives to be obedient had also declared:

"That is the most perfect Muslim whose disposition is best, and the best of you is he who behaves best to his wives."

الترمذي .

اكمل المؤمنين ايمانا احسنهم خلقا وخياركم خياركم لنسائهم -

And further a famous Hadis is mentioned in Muslim.

"The world and all things in it are valuable; but the most valuable thing in the world is a virtuous woman."

مسلم

الدنيا كلها متاع و خير متاع الدنيا المرأة الصالحة .

However, it seems that there are elements in the sexual impulse itself which lead to domination on the part of the male, and to submission on the part of the female. The animal kingdom is a conclusive example of this doctrine. Dr. Havelock Ellis observes, "To abandon herself to her lover, to be able to rely on his physical strength and mental resourcefulness, to be swept out of herself and beyond the control of her own will, to drift idly in delicious submission to another and stronger will—this is one of the commonest aspirations in a young woman's intimate love-dreams"[1]

1. *Studies in the Psychology of Sex P. 74.*

THE CONCEPTION OF MARRIAGE

The Muslim jurists have not attempted a precise definition of marriage, they speak about the regulation of the marriage tie, about its continuance and dissolution.

Baillie takes his definition from the Kanz, and the Kifayah "Marriage is a contract which has for its design or object the right of enjoyment, and the procreation of children."[1]

Sir Roland Wilson defines it thus :— "Marriage is a contract for the purpose of legalising sexual intercourse and the procreation of children."[2]

Marriage in its origin is "a contract of natural law" and though entirely a personal consensual contract, it is not merely a civil contract under the Muslim law. The institution of marriage is regarded by our jurists, as a secular contract partaking of the nature of Ibadat (religious rite)[3]; for the procreation of children, the regulation of social life and for the benefit of society. Islam considers marriage as a religious devotion. The author of the Darrul Mukhtar observes.

"There is no devotion for us which has all along been recognised from the time of Adam up to the present time, and will continue even in paradise except marriage and faith".

درالمختار

ليس لنا عبادة شرعت من عهد ادم عليه السلام الى الان ثم تستمر في الجنة الا النكاح والايمان -

The Prophet of God himself declared.

"Marriage is my Sunnat, and those who do not obey it are not my followers."

كفايه

بقول عليه السلام النكاح من سنتي فمن رغب عن سنتي فليس مني -

A famous Hadis is reported in Muslim.

"A woman is married owing to four qualifications, for her property or nobility of pedigree, or beauty, or on account of piety. Ye should marry for piety."

مسلم

تنكح المراة لاربع لمالها لحسبها ولجمالها ولدينها فاظفر بذات الدين -

According to the Kifayah, marriage has been given preference over jehad (religious war), which is a cardinal duty of religion. Faith which is the root of all divine worship is classified under the same category as marriage.

1. *Digest P. 4.*

2. *Anglo-Muhammadan Law P. 94.*

3. *Story's 'Conflict of Laws' P. 143. "In many civilised countries....it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil, contract; for it is a great mistake to suppose that because it is the one, therefore it may not likewise be the other."*

Marriage is regarded by all the jurists, as "Sunnat Muvakida" that is, an institution the compliance with which is considered as virtuous and a deviation from which, is regarded as a sin. Sunnat Muvakida is thus defined. "The person who complies with it is rewarded in the next world, and he who does not sins". Hence marriage is a religious rite under the Muslim law, although it is in the form of a secular transaction and a civil contract. The notion of contract is brought into prominence, because it renders facility of divorce, and allows separation of parties easily in the eye of the law, whereas the sacramental aspect would make the marriage tie indissoluble.

In the celebrated book Taudih, marriage is described as an institution which has been legalised for manifold objects, "such as preservation of the species, the fixing of descent, restraining men from debauchery, the encouragement of chastity, promotion of love and union between the husband and wife, and of mutual help in earning livelihood."

Islam provides ample provisions for the repudiation and cancellation of marriage.[1] It grants to the husband the supreme power of divorce at will; but it allows the wife to contract at the time of the marriage, or thereafter to delegate the power of divorce to a third person, or reserve it to herself. This is technically known as the doctrine of Thafveez-ul-Tulak (تفويض الطلاق); while other forms of repudiations effected by mutual agreement and on payment of compensation are known, as "mubarat" and "khula" respectively. The abuse or recklessness with which the right of divorce may be exercised by the husband is restricted by threats of divine displeasure.

The Prophet commanded.

"God has not created anything upon the face of this earth which he dislikes more than divorce."

الدارقطني
ولاخلق الله شيأ على وجه الارض
ابغض اليه من الطلاق-

However the Holy Koran itself sanctioned divorce, as a legitimate mode of separation in extreme cases of unhappiness and misery.

Part. II. ch. II.

"If they have resolved on a divorce, (then let them.) Allah is Hearing and Knowing".

وان عزموا الطلاق فان الله سميع عليم

The Roman law of marriage furnishes a unique parallel. At Rome marriage was regarded as a religious communion between husband and wife. Modestinus in his celebrated definition observed. "Nuptiae sunt

1. *Ameer Ali, Mahommedan Law Vol. II. P. 510 "At the time of the Prophet's appearance, the Hillelite doctrines were chiefly in force among the Jewish tribes of Arabia, and repudiations by the husbands were as common among them as among the pagan Arabs". The restrictions imposed by the Shammaites on divorce were not upheld by the school of Hillel.*

coniunctio maris et feminae, et consortium omnis, vitae divini et humani juris communicatio." (Dig. 23. 2. 1.)

Modestinus' words re-echo the reminiscence of the primitive practice, as by the time of the Emperor Justinian the notion of contractual relation had gained predominance, and the Institutes defined marriage thus.

Lib. I. Tit. 9. 1.

"Marriage, or matrimony, is the union of a man and woman, carrying with it a mode of life in which they are inseparable."

Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens.

Under the Roman law persons who were married by confarreatio originally could not be divorced at all, and according to Gaius a woman in manus could not divorce herself from her husband, but after repudiation could compel him to release her.

Gaius. I. 137.

"A wife subject to manus can no more compel her husband to release her therefrom without dissolution of the marriage than a daughter can compel her father to emancipate her."

.......*haec autem virum suum*[1] nihilomagis potest cogere, quam et filia patrem. Sed filia quidem nullo modo patrem potest cogere, etiamsi adoptiva sit: haec autem *virum* repudio misso proinde compellere potest.

Later on by the time of Domitian the marriage by confarreatio was allowed to be dissolved by a religious form of divorce called "diffarreatio," and the Lex Julia de adulteriis[2] also provided a special form of divorce in the presence of seven witnesses.

The gifted intelligence of the Roman jurists settled the conflict, and the popular view was soon upheld, that the essence of marriage lay in the "maritalis affectio," and therefore the continuance of marriage depended upon the continuance of the "affectio," henceforth the marriage was permitted to be dissolved at the option of either party. If the marriage was cancelled by mutual agreement it was called divortium and resembles the "mubarat" form of repudiation of the Muslim law, and if by the act of one party the Romans called such a divorce repudium, and it is like the "khula" divorce of the Muslim law.

Sir Henry Maine says that the Roman marriage was "the laxest the western world has seen". Indeed with the freedom of marriage and divorce practically at will, it was so. Later Christianity endeavoured to make a change. The conception of indissolubility of marriage began to operate, and eventually in the eighth century it transformed marriage into a simple sacrament: and in the reign of Leo III, the Isaurian, an ecclesi-

1. *Ex. Coni. Kruegeri et Huschkii.*

2. *B. C. 17 (Dig. 24. 2. 9.)*

astical benediction was made essential to a valid solemnization of marriage.[1] But for a long time although the marriage ceremony was a religious one it continued to be treated as a civil contract. Christianity maintained that marriage was a sacrament. The man and wife were made "one flesh" by the act of God. "What therefore God hath joined together let no man put asunder;" "quod Deus conjunxit, homo non separet."

The Catholic Church while recognising the validity of private contracts, required the performance of a religious ceremony, so that the newly wedded parties were "sanctified by the word of God and prayer", and the parties to the marriage were themselves regarded as the "ministers of the sacrament." Some have observed, "Matrimonii sacramentum non est, nisi quid contractui accessorium ab eoque separabile, ipsumque sacramentum in una tantum nuptiali bendictione situm est."[2] The notion that marriage was a sacred tie naturally made it indissoluble. For the separation of the parties the Canon law required the decree of nullity, "annullatio matrimonii", a judicial fiction that it is not the severing of the marriage tie, but a solemn affirmation that such marriage never existed at all.

The Hindu law treats marriage as a sacrament. It is a holy union and not a contract. It is a religious duty incumbent upon all Hindus. The sacred Hindu codes describe marriage as an important "sanskara"; and it is declared, to be the last of the ten sanskaras necessary for the regeneration of males (of the twice-born classes) and for women and for the Sudras marriage is the only prescribed sanskara. The Hindu law adheres strictly to the sacramental aspect of the union of man and woman, and the indissolubility of the marriage tie is essential, consequently legal divorce is not known to the general Hindu law.

The laws of Manu provided none. IX. 46.

"Neither by sale nor by repudiation is a wife released from her husband; such we know the law to be, which the Lord of creatures (Pragapati) made of old".

न विक्रय विसर्गाभ्यां भर्तुर्भार्या विमुच्यते ।
एवं धर्मं विजानीमः प्राक्प्रजापतिनिर्मितम् ॥
(Some substitute "निष्क्रय" for "विक्रय".)

In Story's Conflict of Laws, we meet with this remarkable observation made by Lord Robertson. "The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilised society. The status of marriage is juris gentium, and the foundation of it, like that of all other contracts, rests on

1. *Professor Holland (Jurisprudence P. 295) says "The Christian Church, adopting from Roman law the maxim that 'consensus facit matrimonium' though it stigmatised such marriages as irregular, because not made in 'facie ecclesiæ'; nevertheless upheld them as valid till the Council of Trent declared all marriages to be void unless made in the presence of a priest and witnesses."*

2. *The Encyclopædia Britannica Vol. XVII P. 755 (11th edition).*

the consent of parties. But it differs from other contracts, in this; that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will....unlike other contracts, it cannot, in general amongst civilised nations, be dissolved by mutual consent, and it subsists in full force even although one of the parties should be for ever rendered incapable, as in the case of incurable insanity or the like, from performing his part of the mutual contract."[1].

Lord Robertson's view represents the matrimonial law of England of his time, and the principles which he has enunciated conflict with the Muslim law of marriage, inasmuch as divorce by mutual consent "mubarat" and also in "khula" form is permissible, and impotency if not within the knowledge of the wife, at the time of the marriage, makes the contract voidable, and separation can be effected by a judicial decree.

Further the conception of marriage, as " the voluntary union for life of one man and one woman to the exclusion of all others"[2] is not applicable in Islam, for the Muslim law considers polygamy as lawful. Hence the Muslim ideas of matrimony are not in harmony with the Roman, Christian, or the Hindu conception of marriage. Islam differs from all in treating marriage, at the same time, as a devotion and a contract. It is a compromise between two divergent schools of thought, it falls short of the Roman conception of "Free marriage", predicating the legal equality of the married pair in all respects; but it rises above the conception of indissolubility of a sacrament. Approximating to the Roman " free marriage " is the modern progressive conception of matrimony in the United States of America. The ancient view that husband and wife are one person (according to Blackstone this was the old English Common law rule also) is not found in the United States. It has been replaced by the Roman conception that married parties are two distinct persons. It is equally interesting that the Muslim law, always acknowledged this view, and a Muslim woman has a definite independent legal status in the eye of the law. The notion of the wife's separate property and that there was no community of goods between husband and wife, is fully recognised by the Muslim law.

In fact the contractual aspect of marriage is so prominent in the Muslim law that it has led some jurists to treat it entirely as a civil contract. Mr. Shama Charan Sircar, the Tagore law lecturer (1873) says, that "marriage among Muhammadans is not a sacrament, but purely a civil

1. *Story's 'Conflict of Laws' P. 144.*

2. *Per Lord Penzance in Hyde V Hyde and Woodmansee, L. R. P. and M. 130*

contract; and though it is solemnised generally with recitation of certain verses from the Koran, yet the Muhammadan law does not positively prescribe any service peculiar to the occasion". These observations were accepted by Mr. Justice Syed Mahmud in a judgment and he remarked, "According to Muhammadan law, marriage is a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously",[1] and further he compared marriage and dower with the contract of sale thus. "Her right to resist her husband, so long as the dower remains unpaid, is analogous to the lien of a vendor upon the sold goods, while they remain in his possession and so long as the price or any part of it is unpaid, and her surrender to her husband resembles the delivery of the goods to the vendee......."[1]. His Lordship's remarks remind one of the ancient custom of marriage by purchase and sale—rather a backward step. Mr. Justice Abdur Rahim has correctly observed that "the Muhammadan jurists regard the institution of marriage as partaking both of the nature of 'Ibadat' or devotional acts and 'muamalat' or dealings among men"[2]. The intimate connection between religion, and law, and even politics is so interwoven in the Muslim faith that it is difficult to draw defined and clear distinctions, the more so when marriage is regarded, as the pillar of faith and Sunnat Muvakida by all the jurists.[3] The learned of the Sunni sect have in some cases considered marriage to be a duty, in others obligatory, while in some cases abominable and sinful.

It is customary and obligatory to recite the Surat-ul-Fathia (the opening chapter of Koran) at the time of the Nikah, and an omission is considered as unorthodox. Indeed these ceremonies are signs of solemnity, and as under Mahomedan law, an established custom is recognised, as equivalent to law, it is incorrect to say that an omission to recite Koranic verses is of no legal significance, at least it raises a rebuttable presumption as to the validity of marriage.[4]

Muslim marriage is thus an institution of "Ibadat" clothed in the legal form of contract, regulating sexual intercourse; but its continuance is dependent upon the maintenance of conjugal affection. It is only in extreme cases that a dissolution is effected in harmony with the dictates of the Prophet; it also partakes of the nature of partnership for economic ends and social co-operation for the benefit of uniformity and order in society.

1. *8 All., 149.*

2. *Jurisprudence P. 327. It is similar to Modestinus' view "divini et humani juris" (Dig. 23. 2. 1.).*

3. *Morley's Digest Vol. 1 P. clxxxiii. "The laws of the Hindus and Muhammadans are part and parcel of their religion."*

4. *11 P. R. No. 124 Boulnois J. observed the "legal mode of establishing the status of marriage is connected with a religious ceremony." 13 A. L. J. 113. The Privy Council ovserved that a "Nikah marriage is a religious ceremony."*

Islam like other systems of law, recognises a circle of persons within which lawful marriage may be contracted. A man is prohibited from inter-marrying on the ground of "nusub" or consanguinity, and by reason of affinity (of these there are four degrees) and fosterage subject to exceptions, the other legal impediments are such as polytheism, repudiation, and prohibitions arising from unlawful junction that is a man cannot have more than four wives or marry women within the prohibited degrees to each other, *e. g.*, two sisters.

The Prohibited Circle.

There is remarkable resemblance in the prohibitions under the Roman law and the Muslim law.

Inst. Lib. I. Tit. X. De. Nuptii's.	The Koran. Pait. IV. Ch. IV.
1. "Inter eas enim personas, quae parentum liberorumve locum inter se optinent, nuptiae contrahi non possunt, veluti inter patrem et filiam, vel avum et neptem, vel matrem et filium, vel aviam et nepotem, et usque ad infinitum." .... 2. "..Sane enim inter fratrem sororem nuptiae prohibitae sunt, sive ab eodem patre eademque matre nati fuerint, sive ex alterutro eorum."	حرمت عليكم امهتكم و بنتكم و اخوتكم و عمتكم و خلتكم و بنت الاخ وبنت الاخت و امهتكم التي ارضعنكم و اخوتكم من الرضاعة و امهت نسائكم و ربائبكم التى فى حجوركم من نسائكم التي دخلتم بهن فان لم تكونوا دخلتم بهن فلا جناح عليكم وحلائل ابنائكم الذين من اصلابكم وان تجمعوا بين الاختين الا ماقد سلف ان الله كان غفورا رحيماً ـ

....

3. "Fratris vel sororis filiam uxorem ducere non licet."

....

6. "....Privignam aut nurum uxorem ducere non licet,"

....

7. "Socrum quoque et novercam prohibitum est uxorem ducere, quia matris loco sunt."	ولا تنكحوا مانكح اباؤكم من النساء ـ

The striking difference between the Roman and Muslim prohibitions is that the Roman law regards "adoption", as an impediment on the fictitious misnomer of "spiritual" relationship, while as the Muslim law, does not recognise "adoption," it is no bar to contract lawful marriage. The Muslim law mentions fosterage as a "new additional" impediment.

The Muslim law permits first cross-cousin marriages, and also allows persons to contract levirate marriages. Historically these prac-

tices are interesting, and it is undoubtedly a primitive custom. The institution of cross-cousin marriage was prevalent among the Romans. The marriage of first cousins was forbidden by some Emperors, but again was legalised by Arcadius and Honorius.

Inst. Lib. I. Tit. X. 4.

"The children of two brothers or two sisters, or of a brother and sister, may marry together."	Duorum autem fratrum vel sororum liberi, vel fratris et sororis, jungi possunt.

The modern French, German, Italian and American laws permit first cousins to marry. Blackstone says, that under the influence of Mosaic levitical law, the English Common law also allowed the inter marriage of first cousins.[1] The Canon law still forbids first cousin marriages, and this is the law also in Spain. According to the Hindu law cross-cousin marriages are impossible. The Hindu marriage is restricted by two fundamental rules which exclude, all descendants of the common ancestor, *i. e.* descendants up to the seventh degree through males or females of paternal ancestors, and the descendants up to the fifth degree of the maternal ancestors.

(1) A man cannot marry a woman of the same "gotra" or "pravara."

(2) A man cannot marry a woman who is his "sapinda." The basic principle is contained in the laws of Manu.

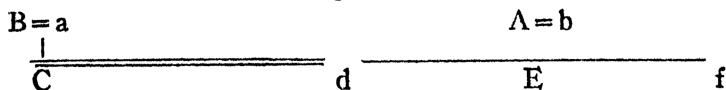
iii 5.

"A (damsel) who is neither a sapinda on the mother's side, nor belongs to the same family on the father's side, is recommended to twice-born men for wedlock and conjugal union."

असपिण्डा च या मातुरसगोत्रा च या पितुः ।
सा प्रशस्ता द्विजातीनां दारकर्मणि मैथुने ॥

From a eugenic point of view, it seems, the Hindu law did well to prohibit cross-cousin marriage. Sir Henry Maine (Early Law and Custom), foresees a secret in the Muslim law permitting near relatives to inter-marry. He says, "It has been noticed by good observers in India, that the comparative liberty of intermarriage permitted by Mahommedanism is part of the secret of its success as a proselytising religion. It offers a bribe to the convert in relieving him from the undoubtedly vexatious restraints of the Brahmanical law of marriage."[2]

In Rivers' Kinship and Social Organization we come across this interesting problem. "Let us take a case in which a man marries the daughter of his mother's brother, as is represented in the following diagram:



One consequence of the marriage between C and d will be that A, who before the marriage of C was only his mother's brother now becomes

1. *Commentaries, Vol. 1, P. 435.*
2. *P. 235*

also his wife's father, while b, who before the marriage was the mother's brother's wife of C, now becomes his wife's mother. Reciprocally, C, who before his marriage had been the sister's son of A, and the husband's sister's son of b, now becomes their son-in-law. Further E and f the other children of A and b, who before the marriage had been only the cousins of C, now become his wife's brother and sister......Through the cross-cousin marriage the relationships of mother's brother, father's sister's husband and father-in-law will be combined in one and the same person, and the relationships of father's sister, mother's brother's wife and mother-in-law will be similarly combined." [1]

The Muslim law forbids the marriage of uncle and neice and this is the rule of law in England, France, Italy, Austria, Spain and some of the states of America. Under the Hindu law such a marriage is impossible. The old Roman law permitted uncle and niece to intermarry and a Senatus Consultum sanctioned the marriage of Emperor Claudius and Agrippina, but this was prohibited by Constantine (Code Theod. I. 2). The Civil Code of Germany and some of the United States permit the marriage of uncle and niece.

Over fourteen hundred years ago the Muslim law sanctioned marriage of a person with his brother's widow and his deceased wife's sister. McLennan assigns a definite place to the institution of levirate, and according to him it is a relic of "fraternal" polyandry. The practice of marriage with the deceased brother's widow is natural result of "the instinct of appropriation and obligation." The classical instance is of Ruth, the Moabitess, widow of the Hebrew, Mahlon, who came to Boaz cousin of the deceased, and demanded of him to marry her. The ancient Hebrews considered it as an obligation, "to raise up the name of the dead."[2]

Manu sanctioned such a marriage in a single case of a girl who had been left a widow, otherwise it is prohibited by the Hindu law; but the Ideiyars, Gandas, and the Jat families of the Panjab frequently contract levirate marriages.

Under the Roman law by an enactment of Code Theodosian a man was prohibited from marrying his brother's widow or his deceased wife's sister.[3] In England bills to legalise marriage with the deceased wife's sister were repeatedly thrown out by the Parliament, generally in the House of Lords, till eventually "Deceased wife's sister Act of 1907," was passed, and the marriage with the brother's widow has recently been legalised.

1. *P*, 20.

2. "*If brethern dwell together, and one of them die, and have no child, the wife of the dead shall not marry without into a stranger; her husband's brother shall go in unto her, and take her to him to wife......"—Deuteronomy xxv. 5.*

3. *Code 3, 12, 2; and 5, 5, 5*

The Muslim law from the commencement of the era of Islam foresaw no difficulty in permitting levirate marriages, for it was prevalent in ancient Arabia as a lawful institution, and of a higher moral level than such corrupt practices, as forced marriages with step-mothers, or with two sisters at the same time.

Second marriage.

The Muslim law recognises widow marriage. The Prophet himself married his first wife Khadija, who was a widow and thereafter Om Salmah, also a widow.

It is said that widow marriages were uncommon in ancient Arabia; but this seems very unlikely, as the custom of sons and heirs inheriting their relative's and father's widows was prevalent; the fact that the ancient Arabs, did not allow widows to marry whomsoever they liked, is consistent with the traditional belief that a woman was not a free agent in marriage. It was the right of her father, brother, cousin or relation to give her hand in marriage. The sons and relatives did not permit widows to marry outside their family.

In the Hindu law widow marriage is forbidden. The laws of Manu declared.

IX. 65.

नोद्वाहिकेषु मन्त्रेषु नियोगः कीर्त्यते क्वचित् ।
न विवाहविधावुक्तं विधवावेदनं पुनः ॥

"In the sacred texts which refer to marriage the appointment (of widows) is nowhere mentioned, nor is the re-marriage of widows prescribed in the rules concerning marriage."

The Roman law also favoured second marriages. The famous statute of Augustus lex Julia et Papia Poppæa (A.D. 9) forced widowers, widows and divorced persons to re-marry. Justinian abolished these restrictions, but priests were not allowed to contract second marriage, and the Emperor Leo VI by Leonine constitutions made marriage for the third time a crime.

It is said that once in England a person who married for the second time or wed a widow was deprived of the benefit of the clergy.

According to Ulpian the older Roman rule was that before contracting second marriage, a divorced woman must wait for six months, and the wife who lost her husband must mourn for twelve months. This provision of the Roman law had survived in England also. In Blackstone's Commentaries (Vol. I P. 457) we find this passage "sit omnis vidua sine marito duodecim menses," which is a provision of the laws of Ethelred and of Canute. In New York the present law

requires the divorced parties to wait for three months before contracting second marriage. It is curious that this peculiar rule was also found in existence in ancient Arabia. The maximum mourning period was one whole year. The Prophet of Islam considerably shortened the mourning period, which is known as "Iddat". For a divorced woman the maximum period of Iddat is three lunar months, for a widow after her husband's death, the prescribed period is four months and ten days only. It is forbidden during the time of the Iddat to propose marriage to a woman. The Koran declares that a woman observing Iddat must be maintained by her late husband. This allowance is like the modern institution of alimony.

Part II. Ch. II.

"For the divorced women make provision according to usage, it is a duty for those who guard (against evil)".

و للمطلقت متاع بالمعروف حقا
علي المتقين -

During the continuance of the Iddat according to the Hanafi law the parties inter-se retain the right of inheritance to each other's property.

Some Jurists recognise the doctrine of equality, "Kufuship", that is all husbands should be the equals of their wives.

The Doctrine of Equality.

The Hedaya quotes a Hadis that the Prophet declared, "Women are not to be proposed and married except by their equals."

هداية
قال عليه السلام: (الا لايزوج النساء الا
ولياء) ولا يزوجن الامن الاكفاء -

There are six qualities of Kufuships. 1. Islam. 2. Lineage. 3. Freedom. 4. Equality of wealth. 5. Piety and Virtue. 6. Equality in trade or business.

The jurists hold that Islam is an essential condition of Kufuship.

As regards "freedom" it was held that a slave is not the equal of a free woman. If after marriage a female slave was emancipated she could cancel the marriage. This right of repudiation is technically known as the option of emancipation. This option is available only to female slaves and not to males. The classical story of Barirah and Mughit who were both slaves is reported in Abu Daud.

Ayesha reports "Barirah was emancipated while married to Mughit, the Prophet gave her an option to repudiate and said to her, "If your husband has connexion with you after being freed you have then no choice."

ابوداؤد
عن عائشة ان بريرة عتقت وهي
عند مغيث فخيرها رسول الله صلي الله
عليه وسلم وقال لها ان قربک فلا
خيار لک -

In such cases the Prophet has advised people to free both the slaves. Equality in respect of wealth was judiciously construed that if a husband was able to maintain his wife and pay her dower, it should be deemed sufficient. In respect of piety and virtue the Imam Abu Hanifa and the Sahibain held, that if a person married his daughter to one believing him to be a pious and virtuous man, and he turns out to be a drunkard, then the marriage may be annulled. As regards equality of trade, the great Imam held that it was immaterial; but his disciples Abu Yusuf and Muhammad were of opinion that it was necessary e. g. a sweeper should not marry a perfumer.

On the solemnization of an unequal marriage the (Asabah) guardian had the right to have the marriage cancelled by a decree of the Court (Kazi).

The Fatawa Kazi Khan supports this view.

"When a woman marries one not her equal, her guardians (Asabah) are entitled to set aside the marriage by referring the matter to the Kazi and subject to his permission."

فتاوي قاضی خان
اذا زوجت المراۃ نفسها غیر کفؤ
کان للاولیاء من العصبة حق الفسخ
ولا یکون الفسخ لعدم اکفاءۃ الا عند
القاضي -

According to the Fatawa Alamgiri the right of objection belongs exclusively to the "Asabah" and not to the uterine relatives, and after the birth of a child, the guardians have no right subsisting to move the Court for the dissolution of marriage. According to Zahir Rewayat, Imam Abu Hanifa and Sahibain held that there was nothing fundamentally wrong in the celebration of marriages between persons of unequal status, and that such marriages remained valid till cancelled by the Court.

The doctrine of Kufuship attempts to limit the range of marriage, and prescribe a social bar. Islam, as a religion, is opposed to any such distinction among Muslims, who are regarded, as equal in all respects.

The Fatawa Kazi Khan observes.

"Kufuship or Equality is relevant in marriage, although Malik and Soofyan, and a party of the "First followers," of the Prophet have dissented. Karkhi differs also."

فتاوي قاضی خان
الکفاءۃ معتبرۃ في النکاح خلافا
لمالک و سفیان و جماعة من الصحابة
رضوان الله علیهم اجمعین وعن الکرخي
رح انه اخذ بقولهم -

According to the Maliki and the Shiah law, Islam and ability to support a wife are the only two conditions of Kufuship. "It is lawful" says the Sharaya " for an Arab to marry a Persian or for a woman of

the tribe of Hashim to marry a non-Hashimite and vice versa ". The fundamental principle is that " all Muslims are equal ". Several unequal marriages were celebrated during the early days of Islam. Asma bin Zaid married a Quresh lady Fatima-bint-Keis, Billal Habshi married a sister of Abdul Rahman; and Abu-Hazigha's slave, Salim married his own master's niece.

The Fatawa Alamgiri holds a similar view, it says " Except Islam and freedom equality in any other respect is not observed in any country except Arabia ".

Sir Henry Maine in "Early Law and Custom" observed, "the outer or endogamous limit, within which a man or woman, must marry, has been mostly taken und● the shelter of fashion or prejudice. It is but faintly traced in England, though not wholly obscured. It is (or perhaps was) rather more distinctly marked in the United States, through prejudices against the blending of white and coloured blood. But in Germany certain hereditary dignities are still forfeited by a marriage beyond the forbidden limits; and in France, in spite of all formal institutions, marriages between a person belonging to the noblesse and a person belonging to the bourgeosie are (distinguished roughly from one another by the particle 'de') wonderfully rare, though they are not unknown." [1]

Similarly the Hedaya says that " Cohabitation, society and friendship cannot be completely enjoyed except by persons of equal status, as a woman of high rank and family would abhor the society of a man of lower status."

The Hindu law prefers inter-caste marriages and though " anuloma union", with women of inferior castes was permissible, the " pratiloma union", that is to say the union of a man of inferior caste with a woman of superior caste was absolutely prohibited,[2] and the children of such connection were called " pratilomaja " and they were entitled to maintenance only, and had no right to their father's estate.

The laws of Manu observed. iii. 13.

" It is declared that a Sudra woman alone (can be) the wife of a Sudra, she and one of his own caste (the wives) of a Vaisya, those two and one of his own caste (the wives) of a Kshatriya, those three and one of his own caste (the wives) of a Brahmana."

शूद्रैव भार्या शूद्रस्य सा च स्वा च विशः स्मृता ।।
ते च स्वा चैव राज्ञश्च ताश्च स्वा चाग्रजन्मनः ॥

1. P. 224

2. *Now permissible by Act XXX of 1923.*

At Rome the notion of equality of marriage was upheld by the law. There was no connubium between the Patricians and the Plebians until C. Canuleius obtained the sanction of the senate and the lex Canuleia was enacted to remove the impediments to marriage. The freeborn (ingenui) and the freedmen (libertini) could not marry till the lex Julia et Papia Poppæa, which still prohibited the marriage of senators with freed women, and prohibited all to marry actresses or women of bad character. The enactment of Constantine prohibiting persons of high rank marrying freewomen of lower class, "humiles adjectæve personæ [2]" was later on repealed by Justinian. [3]

Whatever may be the actual and natural causes, which lead to the contraction of marriages, or prohibition of contracting unequal marriages, Islam repudiates an absolute doctrine of Kufuship, and there is no provision of the Muslim law to restrict such unequal unions or declare them as null and void ab initio. It may further be noticed that the Muslim law neither absolutely restricts "exogamic" marriages, nor does it prefer "endogamy," with a view to keep together within the tribal fold, and prevent the dispersion of family property.

Polygamy.

The Muslim law tolerates polygamy which was customary among the ancient Arabs. It was practised by the Jews and was enjoined in certain cases by the Mosaic law. The 'ancient' Christian Church did not forbid it. The Anabaptists and Bernardino Ochino approved of the institution of plurality of wives. In 1540 Luther consented to the second marriage of Philip the Magnanimous, who married with his wife's approval. Among the tribes of Africa, Australia and the Mormons of America, we find, that polygamy was customary. The Hindu law does not restrict the number of wives. The monogamous marriage of modern times is the outcome of a slow growth, starting from the state of sexual promiscuity, irregular and temporary unions. However all the ancient nations did not indulge in polygamy. The Veddas of Ceylon wandered through the forests in monogamous pairs with their wives, children and hunting dogs. The Romans later on preferred monogamy, and it was a fundamental rule of Roman law that a man could not have two wives at the same time "duos uxores eoden tempore habere non licet".

The Muslim law inherited the doctrine of plurality of wives from time immemorial. So many Prophets had married a number of wives. Jacob had Joseph and his brothers born of different wives, the Prophet Solomon had contracted numerous marriages. Abraham the traditional founder of the Quresh Arabs had at least two wives. He left his second wife Hajra and Ishmael at Mecca.

1. Dig. XXIII 2. 41. *2. C. V. 27. 1.* *3. Nov. 117. 6.*

While in ancient Arabia there was no restriction, as to the number of wives that one could legally marry, Islam limited the number to four, and represented monogamy, as an ideal form of marriage.

The Holy Koran says. Part. IV. Ch. IV.

"Marry such women as seem good to you, two, three or four; but if you fear that you cannot do justice (between them) then marry only one, or what your right hand possess (e. g. captives of war and slaves), this is better so that you may not deviate from the right path."

فانكحوا ماطاب لكم من النساء
مثني وثلث وربع - فان خفتم الا تعدلوا
فواحدة اوما ملكت ايمانكم ذلك
ادني الاتعولوا -

And the Koran says in the next 'Sipara.'

Part. V. Ch. IV.

"And it is not in your power to do justice between wives, even though you may covet it; but keep yourself not aloof from one with total aversion, nor leave her like one in suspense, and if you make reconciliation, and guard yourself, then surely Allah is Forgiving, Merciful."

ولن تستطيعواان تعدلوا ابين النسآء
ولو حرصتم فلا تميلواكل الميل فتذروها
كالمعلقة وان تصلحوا اوتتقوافان الله
كان غفورارحيماً -

Thus Islam prefers monogamy, and it is only in special cases that it permits subsequent marriages.

The laws of Manu lay down specific conditions for celebrating subsequent marriages.

IX. 81.

"A barren wife may be superseded in the eighth year, she whose children (all) die in the tenth, she who bears only daughters in the eleventh, but she who is quarrelsome without delay."

वन्ध्याष्टमेऽधिवेद्याब्दे दशमे तु मृतप्रजा ।
एकादशे स्त्रीजननी सद्यस्त्व प्रियवादिनी

It is said that the Motazala sect of Islam holds marriage with more than one wife as unlawful. Ameer Ali boldly observes, "there is a great difference of opinion among the followers of Islam regarding the lawfulness of polygamy......A large and influential section of Islamists hold it to be absolutely unlawful, the circumstances which rendered it permissible in primitive times having either passed away or not existing in modern times".[1]

This observation is a solitary opinion of an eminent lawyer. The Koranic enactments act for all times as a divine influence, and it is essential for them to be as wide in their application as possible. Monogamy may be an ideal, but polygamy remains a lawful institution recognised by the law all over the Muslim world, in Arabia,

1. *Wilson Anglo Muhammadan Law 3rd Edition P. 467. (Ameer Ali has lately revised hi text, Mahommedan law Vol. II 3rd Edition P. 188.)*

Egypt and other parts of Muslim Africa, in China, India and other countries inhabited by the Muslims.

Referring to this view of Ameer Ali, Sir Roland Wilson remarked "Elsewhere in his book this learned and ingenious writer boldly refers to 'Mussulmans of the polygamous sect,' as though they, rather than his friends, were the schismatic minority, in spite of the fact, that the standard text books of all sects and schools except his own afford absolutely no hint of polygamy being considered unlawful........"[1]

It is further interesting that the early Motazalas[2] during the reign of Al-Mamun endeavoured to proclaim the legality of temporary marriages, though the modern Motazalas totally disapprove of muta, and are now represented as the champions of the cause of monogamy.

The Turkish Government of Angora is contemplating an enactment to make monogamy the general law, and providing that second marriage shall only be celebrated after judicial sanction.[3] A similar movement is progressing in Egypt. In India, as the Muslim male population is in excess of females, polygamy is not practicable for all, and further those who consider it morally objectionable provide against it by a special clause in the marriage contract, but still it flourishes among a "class of men" all over India, as likewise in the Muslim world.[4]

Temporary marriages.

In Ancient Arabia, temporary marriages were common in a modified form of "Free love". The conception of chastity of womanhood began to operate after the dawn of Islam. The ancient Arabs conceived no humiliation or indecency in contracting promiscuous connections. In Al-Tirmizi an interesting narrative is reported.

"Ibn Abbas said Muta was only in the beginning of Islam. A man would come to a town in which he had no acquaintances, then he would keep (marry) a woman for the time that he would stay there, and she would look after him and cook his food for him."

الترمذي
وعن ابن عباس قال انما كانت
المتعة فى اول الاسلام كان الرجل يقدم
البلدة ليس له بها معرفة فيتزوج المرأة
بقدر مايرى انه يقيم فتحفظ له متاعه
وتصلح له شيئه -

This institution may be described briefly as "the marriage of convenience", it was not confined to "a class of women" or prostitutes, but it was a recognised custom that persons whether married or unmarried could contract temporary unions, and their issue generally remained with the mothers. Westermarck observes "Hardly less variable than the moral ideas relating to marriage are those concerning sexual relations

1. *Anglo-Muhammadan law P. 468 (3rd Edition).*
2. *Osborn, Khalifs of Baghdad P. 253 note.*
3. *As reported in the Press 1924.*
4. *"Divorce and polygamy, though perfectly allowable by the law, are thus very much in the nature of luxuries, which are confined to the rich." Baillie, Digest P. XXVI.*

of a non-matrimonial character. Among many uncivilised peoples both sexes enjoy perfect freedom previous to marriage, and in some cases it is considered almost dishonourable for a girl to have no lover".[1] Such was the custom prevalent in the East African Barea and Kunama, in Malay Archipelago, Indo-China and elsewhere. Among the Angami Nagas promiscuous connection is customary as men are desirous of having proof as to their capacity of procreation before they contract a lawful marriage. It is curious that the conception of chastity begins with marriage, and even here the standard varies. According to Mr. Griffis, "Confucianism virtually admits two standards of morality, one for man, another for woman....chastity is a female virtue, it is a part of womanly duty, it has little or no relation to man personally."[2] Similarly the ancient Hebrews forbid fornication to women[3]; but not to men.[4] In Greece virginity was "an object of worship." Athens was proud of virgin's temple, the Parthenon. At Rome the profligacy of women was checked by various enactments, and Tacitus says that the publication of a list of prostitutes on the Aedile's register was in itself a sufficient punishment. The Hindus conceive chastity as a virtue. The Islamic world regards chastity as an essential duty for all Muslims.

The Sunni Muhammadans disapprove of temporary marriages, and according to a tradition reported by the fourth Khalif Ali, the Prophet forbade Muta marriages on the day of the battle of Khyber in compliance with the verse of the Koran found in the Surat-ul-Mumineen.

Part XVIII Ch. XXIII.

"None is lawful except their wives, or those whom their right hands possess, for they surely are not blameable."

الا على ازواجهم اوما ملكت ايمانهم فانهم غير ملومين ٠

Accordingly the Raddul Mukhtar clearly says.

"Marriage in muta form is invalid"

و بطل نكاح متعة و موقت -

And if a Nikah for a fixed term is celebrated the doctrine of Imam Zaffar applies, and such a marriage is regarded as permanent.

But the Akhbari Shiahs still hold that muta marriages are lawful. The present muta marriage greatly differs from the ancient barbaric custom of contracting temporary marriages. The Shiah muta marriage is purely a civil contract approximating to the nature of "Free marriage," and the number of muta wives is not restricted. The essential conditions are a dower and a period for cohabitation which are mutually agreed upon, and the marriage lasts till the efflux of the agreed period, and according to Sharh-i-looma, dissolution of marriage could also be effected by "the doctrine of the gift of the term."

1. *The origin aud development of moral ideas Vol II. P. 432.* 2. *Religions of Japan P.*
3. *"Do not prostitute they daughter, to cause her to be a whore." Leviticus XIX 29.*
4. *Westermarck, The origin and development of moral ideas Vol. II P. 427.*

THE KORAN AND AHADIS.

The Koran may well be described as the final and the great legislative Code of Islam. More authoritative and complete than the Twelve Tables. It is the 'Fons publici privatique iuris', and "Finis aequi iuris" of the science of Muslim Jurisprudence, or it may well be described in the language of Livy as "Corpus omnis *Muslim* juris".

The law of Islam is mainly based on the Koran and the Ahadis (traditions) of the Holy Prophet. The Koran is the divine communication and revelation to the Prophet of Islam. These communications are by way of commands governing the private or public, religious and secular rights and duties of the Muslims of the world.

The Koran boldly enunciates. Part XV Ch. XVII.

"Say if mankind and ginni should combine together to bring out the like of this Koran, they will not bring the like of it, even though some of them helped the others."

قل لئن اجتمعت الانس والجن
على ان ياتوا بمثل هذا القران لا
ياتون بمثله و لوكان بعضهم لبعض
ظهيرا -

The characteristic of the Muslim law is the complete identification of its origin with the personality of the Prophet of Islam[1]. The Mosaic law comes nearest to the Muhammedan law in this respect. The orthodox Muslims acknowledge that there is no need and there will be no divine inspirations subsequent to the Prophet.

The Holy Koran says. Part XXII Ch. XXXIII.

"Mahomed is not the father of any of you, but he is the apostle of God and the seal of the prophets, and Allah is cognisant of all things."

ماكان محمد ابآ احد من رجالكم
ولكن رسول الله وخاتم النبين وكان الله
بكل شيء عليما -

The Christians derive their religion (and law) from the sacred Scriptures, but the New Testament unlike the Holy Koran was written by various disciples St. Matthew, St. Mark, St. Luke and St. John. The Hindus believe to derive their law from the Shastras and the Vedas which are revealed books. There is thus a similarity between the Muslim, and Jewish and Hindu law in their origin as divine communications, but the reverence which the Muslims have for the Koran as "the word of God" is unsurpassable and astonishing for non-muslims.

1. *"And so true a mirror is the Coran of Mahomet's character, that the saying became proverbial............His character is the Coran" Sir William Muir, the life of Mahomet P. 563.*

The Koran says. Part. XXII. Ch. XXXVI.

O Prophet ! the Koran is full of wisdom.

يسن - والقران الحكيم -

"Believe ! the Koran possesses eminence."

ص و القران ذي الذكر -

"This book we have revealed to you abounding in good so that they may ponder over its verses, and that wise men may be mindful."

كتب انزلنه اليك مبرك ليدبروا ايته وليتذكرا أولوا الا لباب -

Part. XXIII. Ch. XXVIII.

However, Islam does not profess to promulgate a new religion. It is a continuation of the universal "Faith of God" in vogue since the days of Adam, and this idea is the greatest contribution of Muhammadanism to the world. The Holy Koran itself endorses the view.

Part I. Ch. II.

"Say ye: We believe in Allah, and that which had been sent down to us, and that which was revealed, to Abraham, Ismael, Isaac, Jacob and the tribes, and that which was sent to Moses, and to Jesus and to other Prophets. We make no differenee between them and we resign ourselves to the will of Allah."

قولوا امنا بالله وما انزل الينا وما انزل الى ابراهيم واسمعيل واسحاق ويعقوب الاسباط وما اوتي موسى وعيسى وما اوتي النبيون من ربهم لانفرق بين احدمنهم ونحن له مسلمون -

It is a noteworthy incident that there have been no alterations in the text, due to the great reverence which the Muslims have for the Koran. Sir William Muir in his "Life of Mahomet" acknowledges this fact ; " there is " he says "probably no other work in the world which has remained twelve centuries with so pure a text." The main object of the Koran was not promulgation of law, it lays down fundamental rules; it propounds supreme ethical views, and preaches a doctrine of faith; it acts as " a divine influence underlying and supporting every relation of life and every social institution."[1]

Jurisprudence.

The history of Muslim Jurisprudence may be divided into four distinct periods. The Koranic verses and the precepts form the first step, and are the foundation on which the superstructure of the Four Great Sunni Schools of thought was constructed. This period is called the legislative period, and ends with the death of the Holy Prophet in 632 A. D.

The Koran observed. Part. VI. Ch. V.

"This day I have perfected for you your religion and completed my favours on you and chosen for you Islam as a religion."

اليوم اكملت لكم دينكم واتممت عليكم نعمتي ورضيت لكم الاسلام دينا -

1. *Max Muller's "Introduction to the Science of Religion" P. 152*

The second period commenced with the reign of the 'the rightly guided Khalifs,' (الخلفاالراشدون). It was the period of collection, and preservation of the traditions and precepts of the Prophet. The Koran was the supreme law for the first followers of Islam. In the absence of authority the decisions of the First Four Khalifs were regarded as of high authenticity.

During the reign of the Omayad Khalifs the jurists of Iraq and Mesopotamia commenced the study of law as a science. The Khalif Umar-ibn Abdul Aziz himself possessed an extensive knowledge of Fikah and Hadis, and encouraged the scientific study of law. Wasil ibn Ata the founder of the Motazala sect introduced technical legal phraseology, and classified the laws under different subjects.

The third and the most important era in the development of law began with the reign of the Abbaside Khalifs. This period is remarkable for the consolidation and the theoretical study of the science of jurisprudence. The four great Sunni Schools of law came into prominence. Imam Abu Hanifa (his real name was Numan bin Thabit), the founder of the most important sect was born in 80 A. H. He visited Imam Bakir in Medina and became a contemporary and pupil of his son jafar-Sadik, the great Imam of the Shiah School of law. He attended the lectures of Hamad and the famous traditionists Ash Shabi Qatadah and others. He founded his School at Kufa.

A. D. 699—767.

Imam Abu Hanifa was known all over the Muslim world as a master of Jurisprudence, and "upholder of private judgment (اهل الرائي)." He boldy enunciated the doctrine of Kiyas or analogical deduction and modified its application calling it Istehsan (استحسان). The theory of Istehsan resembles the Preator's Edict or Equity in England. He further extended the application of the doctrine of the consensus of opinion, known as Ijma (اجماع), and recognised the force and validity of reasonable immemorial customs

He attempted to codify Muslim law, and appointed a committee of his forty chief disciples among which Yahya, Abu Yusuf, Daud and Zafar figured prominently. The gigantic code was completed after thirty years labour.[1] But unfortunately it has been lost and we have no trace of it. His two principal disciples, Abu Yusuf who eventually under the Abbasides became the Chief Justice (kazi of kazies) and Muhammad, both great traditionists, were influenced by Imam Malik's teachings. They are universally respected by the Muslims of the world and are given the appellation of "Sahibain." Abu Hanifa refused to accept high judicial offices which were offerred to him. He was imprisoned and there he died, poisoned it is said at the instance of the second Abbaside Khalif.

1. *Abdur Rahim Muhammadan Jurisprudence P. 26.*

He was so popular with the people that for ten consecutive days about fifty thousand people offerred his funeral prayers. His followers are found all over the Muslim world.

A. D. 713—795.

Malik Ibn Anas is another great jurist. He was born at Medina in 95 A. H. He lived there all his life and held the position of Mufti. He is the founder of the second School known after his name as the Maliki.[1] Malik's doctrines were not essentially different from Abu Hanifa, but he relied more upon traditions and precedents established by the Prophet's "principal companions." He inaugurated the important doctrine of Muslahat (مصلحة), and to the four main sources of Muslim law the Koran, the Hadis, Ijma and Kiyas he added a fifth source Istadlal (استدلال), a juristic deduction distinct from anology. This sect is found in Africa.

A. D. 767—820.

Malik's favourite pupil was Muhammad Ibn Idris Ash-Shafi who became the leader of the third School of Muslim jurisprudence. Shafi was a jurist of great eminence and repute, and his followers are found mostly in Egypt and Arabia. He adopted the views of Abu Hanifa as well as those of his master Imam Malik with such clearness of thought, balance of judgment and moderation, that in importance this School is now reckoned as next to the Hanifi. He was the first to write a legal treatise on Usul. He visited Baghdad in A. D. 810—13; but returned to Cairo where he spent the rest of his life.

A. D. 780—813.

Shafi's favourite scholar was Abu Abidullah Ahmad ibn Hanbal. Imam Hanbal founded the fourth and the last of the Sunni Schools of jurisprudence. He was born in Baghdad in 164 A. H. He was well known as a famous traditionist and theologian. The Khalif Al-Mamun persecuted him for his views on divinity, which served only to enhance his popularity far and wide, and it is said that when he died in 241 A. H. over 800,000 men and 60,000 women attended his funeral. The Hanbali are numerously found in central Arabia, the Persian gulf and in central Asia.

Traditions.

The traditions consist of the actions precepts and teachings of the prophet and their authenticity rests on the "Sunnat." For long they were circulated orally and in course of time some private collections were compiled. During the reign of the Omayad Khalif Omar II, Imam Malik prepared a famous collection known as the "Muwatta." Imam Bukhari collected 600,000 traditions and after a careful selection he included about 8,000 in his famous book "The Kitab-ul-Jami-us Sahih". This celebrated collection was followed by the

1. Mr. F. H. Ruxton's Maliki law.

The development of law by these four Schools may favourably compare with the rise of the Humanists, the French historical School in the 16th century, or to that of Hugo and Savigny's School of jurisprudence.

juristic works of the five great traditionists Muslim, Abu Daud, Tirmizi, Nasai and Ibn Maja. All these are known as "Al-Kutubus Sitta", and are universally revered by the Muslim world. The traditions are divided into four principal divisions. "Hadisul Mutwatir, Sahih, Hasan and Zaif," the essential test is that it should not be contrary to the Koran.

The influence of these traditionists on jurisprudence was great it served to bridge up the differences between the four great schools. The Hanafi became more traditionists, while the jurists of the other schools reciprocally showed an inclination to follow, and adopt the logical methods of Imam Abu Hanifa.

The fourth period is practically the period of "the Law of Citations." The jurists occupied themselves in determining which of the conflicting versions they could safely adopt. The principal jurists of this period were, on Hanafi jurisprudence Abu Bakr Jassasur-Razi, Fakhrul-Islam Bazdawi, As-Sarakhsi, Al-Kurdri, Hisamuddin, and Sadrush-Shariat; on Shafi jurisprudence Abu Bakr ibn Abdullah, An-Nawai, Tajuddin us -Subki and Al-Mahalli; on Maliki jurisprudence Ibn Hajib and Kazi Udud, and on Hanbali Jurisprudence Kazi Alauddin and Abu Bakr ibn Zaidini-l-Kharji.[1] In India the Emperor Aurangzeb had the famous legal treatise Fatawa-Alamgiri compiled in the eleventh century of the Hijree. This compilation was regarded as the Hanafi code for the whole of India.

At Rome some jurists were invested with the "jus respondendi" and their works principally of Papinian, Paulus, Gaius, Ulpian and Modestinus had acquired a prescriptive authority.[2] The great jurists "Responsas" were held as conclusive, and Gaius states "Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est iure condere: quorum omnium si in unum sententiae concurrant, id quod ita sentiunt legis vicem obtinet: si vero dissentiunt, iudici licet quam velit sententiam sequi, idque rescripto divi Hadriani significatur."[3]

The multiplication of the responsas created difficulties and the remedy provided by Emperor Hadrian was ineffective, the Emperors Theodosius II and Valentinian III enacted the "law of Citations" in A D. 426, "that the opinion of majority should prevail, and if the numbers were equal the view of Papinian should be applied." Mr. Justice Mahmood of the Allahabad High Court in the Full Bench case of *Abdul Kadir* v. *Salima* (8 All 149)[4] endeavoured to introduce a similar rule on the ground that "it is a general rule of interpretation of the Muhammadan law that in cases of difference of opinion among the jurisconsults Imam Abu Hanifa and his two disciples Quazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed, and in the application of

1. *Abdur Rahim, Muhammadan Jurisprudence P. 36.*
2. *Cod. Theod. 1. 9. 3.*
3. *Bk. 1. 7.*
4. *But in 15 All., 321, the High Court approving 20 Cal., 116 followed Imam Muhammad in perference to Abu Yusuf.*

legal principles to temporal matters, the opinion of Quazi Abu Yusuf is entitled to the greatest weight."[1]

It is submitted that it may be a plausible rule; but the Hanafi school of jurisprudence does not sanction it. This obiter dictum cannot be accepted as a legal decisive formula. The Hanafi Muslim universally uphold the view of their founder, the great Imam Abu Hanifa like the Maliki, Shafi and Hanbali who follow their own leaders.

The Hanafi Jurists place in order of preference first the Great Imam Abu Hanifa and then the four disciples who are known as Mujtahids.

1. Abu Yusuf } called the Sahibain.
2. Muhammad }

3. Zafar } But bracketed as equal in the Durrul-Mukhtar.
4. Hasan ibn Ziad }

The author of Durrul-Mukhtar observes.

"A mufti should give his final Fatwa in accordance with the opinions of all the Ulemas, if they agree, but if they differ, the jurists are not agreed as to the course which is to be followed. The most approved doctrine is that a Fatwa should generally be given in accordance with the opinion of Imam Abu Hanifa. This opinion is also supported by the Sirajia and other books. The opinion of Abu Yusuf should be next acted upon, and then that of Muhammad and then of Zafar and Hasan Ibn Ziad."

درالمختار

رسم المفتی ان ما اتفق علیه اصحا
بنا في الروايات الظاهرة يفتى به
قطعا واختلف فيما اختلفوا فيه والاصح
كما في السراجيه و غيرها انه يفتي
بقول الامام علي الاطلاق ثم بقول الثانی
ثم بقول الثالث ثم بقول زفروالحسن
ابن زياد -

It is a fundamental principle of the Hanafi school of Jurisprudence that, "The saying of no disciple is outside the views held by the Imam. In Kitabul Jina and the Walwalagiah it is stated that Abu Yusuf said that he had not expressed any views differing from Abu Hanifa, except when the latter had held them and then abadoned them. Similar declaration was made by Zafar."

ردالمختار

ليس لاحد منهم قول خارج عن
اقواله ولذاقال في الولو الجية كتابا
الجنايات قال ابويوسف ماقلت قولا
خالفت فيه ابا حنيفة الا قولا قدكان
له وروي عن زفرانه قال ماخالفت ابا
حنيفة في شئي الا قد قاله......

It seems that none of the great disciples have differed from the main principles of Abu Hanifa, and even if they do the Hanafi sect will follow

1. *Sir Roland Wilson (Anglo-Muhammadan law P. 92) says that "this, however, was a mere personal dictum neither necessary to the decision of the case nor supported by his authorities."*

the opinion of the Great Imam. The Sahibain were never recognised as "masters or founders" by the Muslims.

The Raddul-Mukhtar says.

"In the opinion of the Hanafi jurists it is a settled principle, that no Fatwa should be given, and no opinion acted upon, but that of the Great Imam. One should not act contrary to his opinion and in conformity with the opinions of Imam Abu Yusuf and Imam Muhammad, or one of them, or that of any other except when it is compulsory as in questions of Muzaraat (cultivation), and although it may have been explained by the learned in religion that the Fatwa is in accordance with the opinions of Imam Abu Yusuf and Muhammad; because the great Imam is the founder of the sect and he is the first Imam. It is written in Kitabul Kuza that it is not only allowable but incumbent that a Fatwa be given according to the opinion of the Great Imam, though it may be uncertain upon what authority his saying was based."

ردالمختار

من شهادت الخيريه المقرر عند
نا انه لا يفتي و يعمل الا بقول الا مام
الا عظم ولا يعدل عنه الى قولهما اوقول
احد هما اوغير هما الا بضرورة كمسئلة
المزارعه وان صرح المشايخ بان الفتوى
علي قولهما لانه صاحب المذهب
والامام المقدم و مثله في البحر وفيه
من كتاب القضاء يحل الافتاوى بقول
الامام الاعظم بل يجب وان لم يعلم من
اين قال -

Hence it is clear that the Hanafi prefer to follow the opinions of the great Imam, and there is no generally accepted rule of law, that if Abu Yusuf and Muhammad jointly disagree with their master then the view of the Sahibain should be adopted. Ameer Ali has criticised Mr. Justice Mahmood's view adversely. He says "there is no such fixed rule......for over and over again Fatwas are delivered in accordance with the opinion of only one."[1] However there are a certain number of principles which are governed by the opinion of the two disciples, and some even by the opinion of Imam Muhammad in preference to Imam Abu Yusuf, e.g. the principles governing the rule of inheritance concerning the distant kindred, where a simple method enunciated by Abu Yusuf was rejeced by the "Ulema" in preference to a complicated system of Imam Muhammad. As regards the creation of wakf (charitable and religious dedications) and its management, all observations made by Abu Yusuf have been adopted in toto by the Hanafi jurists in preference to Imam Abu Hanifa's view and dessenting opinions of Imam Muhammad. The Muslim law of Wakf is a triumph for the juristic exposition of the Hanafi law by Imam Abu Yusuf. It refutes the proposition "that the opinion of the majority must be followed".

1 *Mahommedan law Vol. II P. 499.*

1. *This chart is gratefully taken from Mr. Tyabji's "Principles of Muhammadan law" by P. 532.*

	SUNNI HANAFI LAW.			SHIAH LAW.
	Abu Hanifa.	Abu Yusuf.	Imam Muhammad.	Shiah Authors.
Ownership ..	The ownership of the 'Waqif' subsists.	The ownership of the 'Waqif' abates, in favour of ownership of God.		The ownership in beneficiaries.
Revocability ..	'Waqf' is revocable unless (a) there is a decree of court, or (b) it is testamentary.	'Waqf' irrevocable on the mere pronouncing of of the word.[2]	'Waqf' irrevocable after possession given to 'mutwalli' not before?[3]	'Waqf' irrevocable after possession given to beneficiaries or 'mutawalli.'
Musha ..	..	'Waqf' of 'Musha' valid except as to mosque.	'Waqf' of divisible 'Musha' invalid.	'Waqf' of Musha, valid.
Perpetuity ..	Must expressly purport to be in perpetuity.	Perpetuity will be presumed if not stated.	Must expressly purport to be in perpetuity.	Must not purport to be limited to fixed period of time.
Object failing ..	If the object of 'Waqf' fails, or is such that it may fail, 'Waqf' is void.	If object of 'Waqf' fails, it will result in favour of poor.	If the object such as may fail, the 'Waqf' is void.	If object of 'waqf,' fails the property to reverts the waqif or his heirs.
'Waqif' I. taking benefit	..	'Waqif' may take benefit under the 'Waqf.'	'Waqif' cannot taken any benefit under the Waqf.	'Waqif' cannot take any benefit under the Waqf.
II. As mutawalli	..	Appointment of Waqif as 'Mutawallis' valid.	Appointment of waqif as mutawalli not valid and avoids 'Waqf'	Appointment of 'Waqif' as 'Mutawalli' valid.
III If no 'mutawalli' ..	..	If no mutawalli appointed 'Waqif' will be considered mutwalli.	If no mutawalli appointed 'waqf' void.	If no 'Mutawalli' appointed the beneficiary acts as 'mutawalli' unless the waqf is for some object of general utility.
V Removing 'mutawalli'..	..	The waqif may validly reserve to himself the power of removing the 'Mutawalli.'		
	.	If power not expressly reserved, it will be presumed to have been reserved.	If power not expressly reserved, the waqif cannot remove the 'mutawalli.[4]	

2. *Shafi agrees with this : Minhaj, 232, (Bk. 21 s. 3.)*

3. *"The Hanafi authorities are equally divided on this point, though Malik, Shafi and Ibn Hanbal agree with Abu Yusuf in holding that nothing more is needed than a declara- of waqf to make it irrevocable,*

"The Shaikhs of Bukhara are said to accept Imam Muhammad's opinion in accordance with which the Fatawa Alamgiri says the fatwa is given ; the Shaikhs of Balk however adopt Abu Yusuf's view."

As to a direct conflict between the Great Imam and the Sahibain, the classical case in the law of inheritance, whether a grand-father excludes full brothers or sisters may be cited. The authorities for and against the right of grand-father to exclude brothers and sisters are as follows.

For
1. Abu Bakr, the first Khalif,
2. Imam Abu Hanifa.

Against
1. Abu Yusuf }
2. Muhammad } Sahibain.
3. Imam Malik }
4. Imam Shafi } The founders of the second and third Schools of Sunni law.
5. Ali, the fourth Khalif.
6. Zaid.

The balance of opinion is thus clearly in favour of the Sahibain, but the Hanafi law adopted the view of Imam Abu Hanifa in toto, and the celebrated Sirajiyah says. "Brothers and sisters by the same father and mother, and by the same father only, are all excluded..........even by the grand-father, according to Abu Hanifa, on whom be the mercy of Almighty God!" Sir William Jones in his commentary on the Sirajiyah says that "the dispute is now settled among the Sunnis according to the opinion of Abu Hanifa, and the chapter on *division* seems to have been inserted merely from respect to Abu Yusuf and Muhammad who dissented on this point from their master."[1]

THE DIVISION WILL BE THUS TAKING A SIMPLE CASE.

	According to Abu Bakr and Abu Hanifa.	According to Ali.	According to Zaid.
Grand-mother	$^1/_6$	$^1/_6$	$^1/_6$
Grand-father	$^5/_6$	$^1/_6$	Joint share. $^5/_6$
Sister	Excluded	$^1/_2$	
Consanguine sister	Excluded	$^1/_6$	

It may be noticed here that the Shiahs, the Shafi and the Maliki follow the contrary view to the Hanafi Sunni.

The principle cases in which the opinion of the Sahibain or any disciple of Abu Hanifa has been accepted are few and well known and upon these the learned Ulema, and Mujtahids are agreed, and they are specially mentioned in the law books. A well known instance where rather a lenient view of Abu Hanifa was rejected occurs in the case of hudd *i.e.* punishment of 100 stripes for committing adultery. The great Imam held that where a person contracted marriage within the prohibited degree even with knowledge of its illegality then the factum of marriage averts hudd, but he may be punished slightly. Abu Yusuf and Muhammad differed from their master and held that a man with knowledge of

1. According to Art. 609 (3) of the Egyptian code the grandfather excludes the brothers and sisters, but according to Art. 597 he takes concurrently with them.

unlawfulness of marriage cannot escape hudd, and the Fatawa with the concurrence of the Ulema is according to their joint opinion.

Text, Fatwa, Ijma.

The Muslim jurists are agreed that texts have preference over their commentaries and that the commentaries are preferable to the Fatwas.

"That saying should be acted upon, which is in the text, because when there is conflict between the text and Fatwa, the reliable one is the saying in the text, In the same way the principles in the commentaries are preferable to those in the Fatwa."

رد المختار، كتاب القضاء

العمل على مافى المتون لانه اذا تعارض ما في المتون والفتاوي فالمعتمد مافي المتون كما في انفع الوسائل وكذا يقدم مافي الشروح على مافي الفتاوى -

When there are two conflicting sayings then the Mufti may use his discretion in deciding the case.

"If there are two correct sayings on one point, it is lawful to give the Fatwa according to either of them."

در المختار

وفي وقف البحر وغيره متى كان في المسئلة قولان مصححان جاز القضاء والافتاء باحدهما -

And the Author of Raddul Mukhtar comments on the term lawful " جايز " thus.

"It is necessary that this power be limited to the case when neither of the sayings is contained in the text."

رد المختار

وينبغي تقييد التخيير ايضا بما اذا لم يكن احد القولين في المتون لما قدمناه -

However, every one is not competent to give a Fatwa, it is an accepted view that Mufti and Mujtahids are fit and proper persons to express an opinion. They should be well acquainted with the science "Usul and Faru" and they alone have a voice in the exposition of the law by Ijma. Ijma is defined as the agreement of the jurist's in a particular age on a question of law. But Ijma of one age may be reversed by subsequent Ijma of the jurists.

"According to Imam Abu Yusuf, it is not allowed for any one to give a Fatwa except a Mujtahid. According to Fathul-Kadir all jurists are of opinion that Mufti and Mujtahid are one and the same."

تصحيح و فتح القدير

ان ابايوسف قال لايحل الفتوي الا لمجتهد وقال في فتح القدير وقد استقررأى الاصوليين على ان المفتي هو المجتهد -

According to Tahtavi there is no distinction between a Mufti and a Kazi.

طحطاوى

لافرق بين المفتي والقاضي -

Mujtahid is defined as a learned person who knows the Koran and Hadis and is competent to draw inferences. It is so said in the Talvih, but a mere fact of being competent in Koran and Hadis is not sufficient. He should know the science of law, otherwise he would be disqualified from taking part in Ijma of the learned,

تلويح

و شرط الاسلام والعقل والبلوغ
وكونه فقيه النفس اي شديد الفهم
بالطبع و عالم باللغة العربية و كونه
حاويا بكتاب الله تعالى فيما يتعلق
بالا حكام وعالما بالحديث متنا
وسندا ونا سخا و منسوخا -

"A Muslim, wise, adult, intelligent, learned in Arabic and in the mandatory passages of the Koran, learned in the Hadis found in the text-books or reported orally as well as those already abrogated."

The authority of Ijma is founded on numerous well known texts.

The Koran says. Part V ch. IV.

يا يهاالذين امنوا اطيعوالله و
اطيعوا الرسول واولى الامر منكم -

"O believers, Obey God and obey the Prophet and those in authority among you."

Some Hadis are:—

"My followers will never agree upon what is not right".

"It is incumbent upon you to follow the most numerous body".

The election of the first Khalif Abu Bakr was by the votes of the people based on the broad principle of Ijma, and after the death of the Holy Prophet, the first followers accepted Ijma as a suitable mode of deciding important issues not merely in matters of religion and law ; but also in such matters as preparation for war, organisation of army and executive administration.

ROMAN LAW.

The influence of the Roman law over many legal systems of the world is known and needs no comment. The Roman law still lives in the world in a disguised form of " the Roman—French law, the Roman—German law, and the Roman—English law". Its influence can be traced in moulding the laws not only in Europe, but also in America. Professor Sherman of Yale University has well said " From Rome we have inherited our conceptions of law, the state and the family".[1] If it is possible to trace the influence of Roman law in Europe and America, which were the field of its later operation, then is their any difficulty in estimating its influence on the Muslim law? From the time of the Hijrat(Flight to Medina A. D. 622, to the death of the Prophet in A. D. 632,) within a short period of ten years, the temporal power of Islam was established in the desert round about Mecca and Medina. The First Khalif Abu Bakr obeying the last injunctions of the Prophet sent an army to conquer lands and preach Islam. The rise of Islam in the seventh century was followed by the rapid conquest of the vast territories of the Roman Empire in Roman Syria, Roman Africa, and Egypt etc. All Syria east of the Jordon, Antioch and Damascus fell, and Jerusalem was taken in 637 A. D. Egypt was annexed by 641 A. D. When the armies of Islam entered these countries, they found a distinct civilisation and a sound administration of justice. Is it not likely that the invaders adopted some of the methods of administration and law of the old Justinian Roman law? The Roman law schools flourished at Beirut and Alexandria long after the Arab conquest, and indirectly exercised their influence. The founders of Muslim jurisprudence especially Imam Shafi were admittedly acquainted with the principles of Roman law, as enforced in Syria. Professor Goldziher of the University of Vienna (Principles of Law in Islam) says. "The influence of Roman law on the sources of a legal system in Islam is attested by the very name given to jurisprudence in Islam from the beginning. It is called *Al-Fikh*, reasonableness; those who pursue the study of it are designated *Fukaha* (singular *Fakih*). These terms, which, as we cannot fail to see, are Arabic translations of the Roman (*juris*) *prudentia* and *prudentes*, would be a clear indication of one of the chief sources of Islamic jurisprudence, even if we had no positive data to prove that this influence extended both to questions of the principle of legal deduction and to particular legal provisions."

1. *Roman law in the Modern world Vol. I. P. 1.*

There is so much similarity in the principles of the Roman and the Muslim law that an observer conversant with the Roman law cannot but conclude that some portions of the laws of Islam are merely republication of Justinian Roman law, clothed in an Arabic dress. In Muslim law the dualism of written and unwritten law, or customary law, irresistibly reminds one of leges scriptae and leges non scriptae. The distinction between moveable and immoveable property survived in the Muslim law, and the Muslim law of sale (بيع), barter (مقايضه), hire (اجارة), deposit (وديعة), pledge (رهن), suretyship (كفالة), Agency (وكالة), Partnership (شركت العنان شركت الصوافضه) etc compare favourably with the Roman law of emptio venditio, locatio-conductio, depositum, pignus, and with various forms of societas. The distribution of inheritance on intestacy, namely first the descendants, second the ascendants, third collaterals is also similar, and the division of inheritance into fractions of $\frac{1}{8}$, $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{6}$, $\frac{1}{3}$, $\frac{2}{3}$ is like the division of the Roman heriditas into an "as" devided into twelve unciae. The view that the testator cannot dispose of all his property so as to deprive his heirs altogether is found common to both the systems of laws. Justinian provided by the 18th Novel that a testator should leave at least $\frac{1}{3}$ or $\frac{1}{2}$ the property to four or more children respectively, similarly the Muslim law limits the power of bequest to $\frac{1}{3}$ of the net assets. The Muslim law like the Roman law has the institution of guardianship for minors. According to Imam Abu Hanifa "The cura of adolescentes" must end on their attaining twenty five. Von Kremer[1], injeniously points out that this is as an unmistakeable trace of the influence of Roman law. But the reasons assigned by the Imam are different from tbe conception of Roman "Cura," and the Sahibain Abu Yusuf and Muhammad held that the age of twenty five was no criterion for ending guardianship e. g. a prodigal should always remain under "perpetua tutela". The conception that a Roman will became invalid by Querela inofficiosi Testamenti which assumed that the testator was "insane" at the time of making the will survived in the Muslim law in domain of wills and in the doctrine of Marzul-maut. The Muslim law assumes the same capacity for making the will as the Roman testamenti factio. As regards the oral and written wills Sir Roland Wilson says "the conjecture that the Muslim Arabs learned to make wills when they conquered the Roman provinces of Syria Mesopotamia and Egypt' is clearly refuted by the Koran, as regards oral wills, but may possibly be well founded as regards written wills"[2]. It is suggested that the Muslim oral will is the survival of testamentum in procinctu on the ground that the Arabs serving in the Roman army in Syria must be familiar with military

1. *Culturgeschichte des Orients unter den chalifen, Vol. I. Ch. IX,*
2. *Anglo-Muhammadan law P. 307.*

wills. The similar prescriptions periods of three, ten, twenty and thirty years are also found in the Muslim law.

In the sphere of marriage there is remarkable likeness, the institution of dower resmbles donatio propter nuptias and divortium and repudium are "the mubarat and khula divorces" of the Muslim law, and the prohibitions of contracting marriage with near relations is striking to an observer of comparative jurisprudence.

The history of the Muslim institution of pre-emption (Shafa شفعة) is interesting. Is it the survival of the Roman law of Pre-emptive right to acquire by purchase in the case of emphyteusis, if the emphyteuta desired to alienate the property to strangers. It seems not, for the Muslim law of Shafa is exhaustive, and grants a right of action to the pre-emptor even against the vendee. In fact it resembles the Ketract-recht (jus retractus) of the German law.

The theory of the Muslim law of "hiba" stands both in remarkable resemblance and in contrast to the Roman law of gifts "de donationibus". According to the Shara "hiba is a voluntary transfer of property without consideration, and a gift in the Roman law is "an alienation which is made without the law compelling you to do it *i. e.* "quod nullo jure cogente conceditur "[1]. But under the Muslim law the general principle is that the delivery of possession is essential to complete the gift, "while Justinian observed even if there be no "tradition" they shall be completely effectual and place the donor under the necessity of making tradition."[2] In both systems gifts were complete whether in writing or not, and the right of revocation of gift was personal to the donor and donee. It could not be revoked after their death, and under the Muslim law a gift was irrevocable if made to "relations within the prohibited degrees", as also in the case of Hiba-Bil Iwaz or Hiba Ba Shartul Iwaz. The Roman law with a few exceptions (Ulp. Reg VII. I) prohibited gifts between husband and wife, the Muslim law freely allows it, and according to the Hanafi law such a gift cannot be revoked.

There are some differences between the two systems, and it is unsafe to trace peculiar principles of the Shara to the Roman law. Mr. Justice Markby attempted to introduce the fiction of " hereditatem dominam esse et defuncti vicem obtinere" into the Muslim conception of Hereditas.[3] His Lordship erred because the theory of representation (except in the

1. *Dig LXV.*

2. *"ut,et si non tradantur, habeant plenissimum et prefectum robur et traditionis necessitas incumbat donatori." Inst. lib. II Tit. VII. 2.*

3. *4 Cal. 142. "That the estate itself is owner and stands in the place of the deceased'*

Shiah law) is unknown to the Muslim law. According to the Shara the estate of a deceased person devolves upon his heirs immediately, though charged with debts, and there is no intermediate vesting in any one, nor is there any necessity of adopting the Roman plan of instituting a slave as heres necessarius. Hence Ulpian's opinion as regards Hereditas Jacens 'non heredis personam, sed defuncti sustinet', or Pomponius' opposite view that it sustained the persona of the heir is not applicable to the Muslim law, nor the principle of "semel heres semper heres" applies to a Muslim heir. In the Shara there is no "confusio" of the property of the deceased and the heir. The property of the deceased is only liable for the debts, consequently there is no necessity of "beneficium abstinendi" or "beneficium inventarii" for the Muslim heir.

Another distinctive feature is that the rule of legitimation "per subsequens matrimonium" is foreign to the Muslim law. In Rome, as in Scotland, in France and in England the legitimation of ante-nuptial children by reason of subsequent marriage was possible. Under the Muslim law a child born of illicit intercourse can never be legitimatized even by his father's acknowledgments. He is termed as "walud-uzzina" and cannot inherit from his natural father. This rule of the Shara is so strong that it is conclusively presumed that a child born within less than six months after the marriage of the mother is deemed not to have been begotten by his natural father in lawful wedlock. Hence such a child is treated as illegitimate.

The fact, that the Muslim jurists though they seem to have borrowed something from the Roman law, yet make no reference to it, is not sufficient to exclude the presumption of our indebtedness to the Roman jurists. Mr. Abdur Rahim remarks "Since the Muhammadan jurists themselves make no allusion to the Roman system, and their theories exclude its recognition as a factor in moulding the Muhammadan system, it is difficult to determine with any degree of certainty the extent of the obligations, if any, of the Muhammadan jurists to the Roman jurists".[1] This is rather a casual remark. Maulvi Shibli has likewise criticised Professor Amos' observation that "......it seems also true that Muhammadan law is nothing but the Roman law of the Eastern Empire adopted to the political conditions of the Arab dominion,"[2] and in his Urdu life of Imam Abu Hanifa denies the influence of Roman law on Islamic jurisprudence. But Moulvi Shibli did not possess first hand knowledge of the Roman law which alone accounts for his view.

1. *Muhammadan Jurisprudence P. 23.* 2. *Roman law P. 415.*

It seems there was "a pious conspiracy of silence" among all the Schools to make no reference to the Non-Islamic sources whether Roman, Jewish Egyptian or Persian and Hindu all alike, but the reason is not obscure. The jurists preferred tracing every issue of law to the Holy Koran and to the Prophet to acquire a prescriptive authority for their novel views, and this fact alone solves this difficult branch of historical enquiry.[1]

The development of the Muslim law also reminds us of the Roman law. The Koranic injunctions like the XII Tables are the first legislative enacments of Islam, but with this important difference the Koran is fairly complete and not like fragments. The Mufties and the Kazies of Islam possessed " the jus ediciendi ", similar to the higher magistrates of Rome. The Muslim jurists needed no conception of Jus Naturale or Jus Gentium because the Holy Koran was for them the "Word of God" and embodiment of perfect law. If deficient in any respect it was supplemented by the traditions and precepts of the Prophet. There could be no difference of opinion on the integrity and authority of the explicit Koranic injunctions; but the enormous numbers of the traditions created dissensions, and it was here in the application of traditions that the jurists found a field for expansion and modification of law. In the beginning the School of Muslim Jurisprudence was divided into two distinct groups the upholders of private opinion (اهل الرأى) and upholders of traditions (اهل الحديث); but it must not be taken for granted that the former class led by Imam Abu Hanifa ignored in toto the authenticity of reasonable and sound traditions, in fact the " Sahibain," Imam Abu Yusuf and Muhammad were classed as traditionists of great repute.

The difference was that the four Schools laid a different degree of stress on one or more sources of the law namely the Koran the Hadis (traditions), Ijma and Kiyas. The development of law was not confined merely to judicial interpretation; but it developed in a movement similar to the Responsa Prudentium of Roman law, and it ended naturally by a period of consolidation and selection of conflicting opinions analogous to the period which necessitated the Roman " Law of citations ".

The striking feature in the development of law, both Roman and Muslim, is that the laws in general were expounded by the *bar* and not the *bench*, and both systems developed from a code, the Koran and the XII Tables, and not directly from usages and customs. This is a fine distinction, and herein lies the difference between the development of the Roman, the Muslim and the English systems respectively. Sir Henry Maine says "the theoretical descent of Roman Jursi-

1. *"There soon arose, on the one hand an enthusiastic admiration and love for his character, and on the other, a contempt for the period before Islam and all connected with it".* *F. B. Tyabji " Principles of Muhammadan law," P. 5.*

pundence from a code, theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the development of their system differed from the development of ours."[1]

The chief agencies by which the progress of law is effected are in their historical order Legal Fictions, Equity and Legislation. Fiction is "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration its letter remaining unchanged, its operation being modified."[2] In the Roman law the Fiction of Adoption, the interpretation of the pontifices and that of the prudentes are notable examples. Similarly under the Muslim law the doctrine of Ijma, consensus of opinion among the jurists in a particular age on a question of law, and later juristic deduction technically known as analogy, "Kiyas," are instances of development of law by legal Fictions. The function of analogy is to extend the law of the text, the theory being that the newly discovered law though not covered by the language of the text is governed by the reason of the text. Mr. Abdur Rahim points out that "the writers on jurisprudence do not admit that extension of law by process of analogy amounts to establishing a new rule of law."[3]

The next stage is the development of law by Equity. "The Equity whether of the Roman Praetors or of the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed."[4] It seems to posses a superior sanctity. The introduction of Jus Naturale illustrate the influence of Praetorian equity in the Roman law and the point of contact between the Jus Gentium, and Jus Naturale was this notion of "Aequitas," a levelling influence. In the Muslim law Imam Abu Hanifa supplemented this process of law and called it Istehsan. Thus a jurist was permitted to devise a rule of law in the interest of justice and public welfare. The Hanafi jurists speek of Istehsan as hidden analogy; the other three Schools opposed this innovation, and Imam Shafi retorted "whoever resorts to Istehsan makes law." But in course of time they were forced to modify their views, and Imam Malik, founded the doctrine of public good "Muslahat" a process similar to juristic equity, and followed it by inventing Istidlal a distinct method of juristic ratiocination which the Shafi also accepted. Kazi Udud says, that the Hanafi doctrines of Istehsan, and the Maliki doctrine of public good are covered up by Istidlal.

1. *Dr. Moyle, Imperatoris Justiniani Institutionum P. 29*
2. *Maine's Ancient law P. 29.*
3. *Muhammadan, Jurisprudence P. 139.*
4. *Maine's Ancient law P. 33.*

The development of law by Istehsan, Muslahat and Istidlal is the period of juristic Equity in the Muslim law.

Legislation is the last agency to come into operation, as a suitable and proper means of effecting alterations in the laws governing civilised communities. It differs from Legal Fictions and just as much from Equity as "Its obligatory force is independent of its principles." The codification of Roman law under Justinian, and partial codification and enactments relating to the Muslim law, notably the modern Egyptian code of Hanafi law, and various enactments in Turkey, in India and other countries are the latest agencies in the development of the Shara of Islam.

But the Muslim law was greatly developed in a movement parallel to the Responsa Prudentium of Roman law. Bryce has correctly remarked "In the East, as for instance, in such countries as Turkey or Persia, there is little that can be called general legislation. Hatts are no doubt occasionally promulgated by the Sultan, though they are some times not meant to be observed, and are frequently not in fact observed. So far as new law is made, it is made by the learned men who study and interpret the Koran and the vast mass of tradition which has grown up round the Koran. The existing body of Musulman law has been built up by these doctors of law during the last twelve centuries, but chiefly in the eighth and ninth centuries of our era; and a vast body it is."[2] Thus similar to the influence of the Hindu law and the English law on the Muslim law, as administered at present in India, it was not possible for the old "Shara" to be un-influenced, and not be tinctured with the Byzantine Roman law, when it came in direct conflict with the Roman system of administration of law and justice. Indeed "no system of law is the product of a single mind or age,"[3] the divine communications of the Holy Koran laid down only the fundamental principles, and the entire bulk of the Muslim jurisprudence is the result of development and expansion, by juristic interpretation and judicial dicta, by legislation and codification, covering centuries of constant labour on the study of the "Shara" itself, and the comparative jurisprudence of other legal systems of the world.

2. *Studies in History and Jurisprudence, Vol II. P. 253.*

3. *"Law is the product of the entire history of a people, an evolution, by orgainc growth." Dr. Sherman, Roman law in the modern world P. 232.*

NIKAH

Nikah literally means to unite and later it came to denote marriage. *Nikah* cannot be effected except by its pillar *rukn* emanting from *ahl* (one who is competent to contract) and in reference to *mahl* (fitting subject of marriage). The pillar *rukn* consists of proposal and acceptance and the effect *hukm* of it is lawfulness of enjoyment, and procreation and generation are its object.

Under the Muslim law[1] marriage is both a civil contract and a religious rite. It is a devotion and act of *ibadat* or piety and since the earliest times (the days of Adam) it has maintained its sanctity, like faith. The Muslim jurists speak of marriage as *farz* (فرض), duty, *wajib* (واجب), obligatory, and *haram* (حرام) sinful, *makrooh* (مكروه) abominable, and there is a consensus of opinion that marriage is a " Sunnat Muvakida."

The celebrated Kifaya says.

" Every follower of Islam or of David's religion is bound to marry, and if he has not power to do so, then he should go forth on *jehad* for the sake of God. Thus the Prophet of God has declared marriage to be one of the religious matters, and has given it preference over *jehad*, and he has allowed marriages up to the number mentioned in the *shara*. He himself entered into matrimony in preference to celibacy, which proves that marriage is superior to *takhalli*, because the Prophet of God tried to follow what was best in religion. A community had intended to worship God and to divorce their women; the Prophet forbade them and said, ' contract marriage, procreate children and multiply; because I shall be proud of your numbers, as compared with those of the followers of the other

كفايه

من كان على دينى ودين داود
فليتزوج وان لم يجد اليه سبيلا فليجا
هد فى سبيل الله فجعل النكاح من
الدين وقدمه على الجهاد وقداهدى
رسول الله عليه السلام فى التزوج الى
العدد المشروع له وقد اشتغل بهن عن
التخلي للعبادة فثبت انه افضل
من التخلي لانه عليه السلام كان يجتهد
لسلوك افضل طريق الدين و قدهم قوم
بالتخلي لعبادة الرحمن وطلاق النسوان
فردعليهم النبى عليه السلام بقوله تنا
كحوا توالدوا تكثروا فانى اباهي بكم
الامم يوم القيامة فهذا الامر لايخلوا اما
ان كان للوجوب كما هو حقيقته اولم يكن
فان كان للوجوب فهو رجحانه على
النوافل لان الواجب راجح على النفل
اجماعاً وان لم يكن للوجوب يكون للسنة

1 " *Muhammadan Jurisprudence purports to be in fact a science of man's rights and duties both spiritual and social,*" *Abdur Rahim. Jurisprudence. P, VII.*

prophets on the day of judgment', The use of the imperative denotes either "*wajoob*" as here or it does not. If it does, it is clear that it has preferenec over *nawafil,* because all the learned agree that *wajib* has preference over *nafil*; and if it does not denote obligation, it is *sunnat*, because it can not be *mustahab* or *mobah* (right and only allowable), since the Prophet of God says, 'marriage is my *sunnat* (or order) and those, who do not obey it, are not my followers' The learned agree in giving preference to *sunnat over nafil.*"

اذالندب والا باحه انتفي بقول عليه السلام النكاح من سنتي فمن رغب فن سنتي فليس مني والسنته راجح علي النفل اجماعاً -

Thus under the Muslim law Marriage is a religious rite, it is *wajib, sunnat,* and a devotion, but it is in the form of a civil contract

According to the Durrul Mukhtar.

"Marriage is obligatory on the person whose passion is ungovernable, but it is a duty if fornication would be the consequence of not marrying, and this obligation and duty are imposed on those who can afford dower and maintenance; if they can not afford them celibacy is not a sin. It is a strict *sunnat* according to the most correct view of the learned in religion, its omission being a sin. One whose condition is moderate, that is, one who is able to cohabit with a woman, to pay dower and support her, marrying with the object of begetting children and avoiding fornication will be rewarded in the life to come. In the Nahrul Faik, marriage is termed *wajib* (obligatory) in preference to *sunnat*, because the continual practice of marriage is proved by the acts of the prophet. He who declines to marry, displeases the Prophet; but marriage is abominable when there is any fear of injustice, and the husband believes that he will do in justice to his wife."

درالمختار

ويكون واجباً عندالتوقان فان تيقن الزنا الا به فرض نهايه فهذا ان ملك المهروالنفقة والا فلا اثم بتركه بدايع ويكون سنة موكدة في الاصح فياثم بتركه ويثاب ان نوى تحصيناً اوولداً حال الاعتدال اي القدرت علي الوطي والمهر والنفقة ورجح في النهر وجوبه للمواظبة عليه بل انكار علي من رغبه عنه ومكروه بخوف الجور فان تيقنه حرم ذالک -

The Muslim law of marriage is based on love and affection. The Holy Koran says.

Part XXI. Ch. XXX.

"He created mates for you of your own species so that you may find peace of mind in them, and he put love and compassion between you."

ان خلق لكم من انفسكم ازواجاً لتسكنوا اليها وجعل بينكم مودة و رحمة -

There is no "merger" of the personality of husband and wife. The woman has a distinct legal status and separate property.

The Koran. Part V. Ch. IV.

"Men shall have the benefit of what they earn and women shall have the benefit of what they earn."[1]	للرجال نصيب مما اكتسبوا وللنساء نصيب مما اكتسبن -

Declaration, consent.

Under the Muslim law, the intention of the parties is essential, when making proposal and acceptance to contract a valid marriage. Ameer Ali observes "Marriage is contracted by means of declaration and consent, both expressed in the preterite", and he significantly adds "that under the Shiah law, however, it is not necessary that both parties should use the past tense."[2]

Hamilton's translation of the Hedaya is to the same effect, "Marriage is contracted, that is to say, is effected and legally confirmed by means of declaration and consent both expressed in the preterite."[3]

Baillie is more precise and accurate. "Marriage is contracted by declaration and acceptance when both are expressed in words of past, or when one of them is expressed in the past and the other in the imperative or the present."[4]

It is submitted that according to the Sunni law, it is not necessary for the proposal and acceptance to be in the past tense, nor does the Hedaya lay it down to be so. The Bidaya which is the text of which the Hedaya is the commentary says.

"Marriage is contracted by proposal and acceptance by two words both in the past tense or one of which is in the past tense and the other in the future tense."	بدایه النكاح ينعقد بالايجاب والقبول بلفظين يعبر بهما عن الماضي و ينعقد بلفظين يعبر باحدهما عن الماضى وبالاخر عن المستقبل -

The Fatawa Kazi Khan makes it clear.

"A marriage is contracted by the use of the word *nikah* and *tazvij* (union) which may be in the past tense, for example a woman says to a man. 'I married you on a certain condition', and the man says in the presence of witnesses 'I accepted', or the words may be in the future tense, for example a	فتاوى قاضي خان النكاح ينعقد بلفظ النكاح والتزويج كان على وجه الخبر عن الماضى نحو ان يقول المرءة زوجت نفسى منك بكذا بمحضر من الشهود فيقول الرجل قبلت اويكون علي وجه الاستقبال بان يقول الرجل للمرءة اتزوجك على هذا فتقول

1. *This passage has been interpreted by some as referring exclusively to spiritual rewards. Sale's, Al Koran, P. 67.*

2. *Mahommedan Law Vol. II P. 329.*

3. *Hedaya (Grady) Bk. II P. 25.*

4. *Digest of Moohummudan law P. 14.*

[1]man says to a woman, ,sehall I marry you on a certain condition? The woman replies 'yes, you may', or the words may be in the imperative mood *e. g.*, a man says to a woman 'Marry me on certain conditions' Then the woman says 'I marry you."

المرءة قبلت اويكرن بلفظ الامربان
يقوال الرجل للمرءة زوجي نفسك مدي
بكذا فتقول الرجل المرءة زوجت -

Similarly the Fatawa Alamgiri (Nahrul Faik) observes.

" A marriage is contracted by offer and acceptance, expressed in the past tense and the other not in the past tense, *i e.* the future tense (as by using the imperative form) or the present (as by using the aorist)."

فتاوى ء لمكيري
ينعقد بالايجاب والقبول وضعا
للماضي اووضع احدهماللماضي والاخر
لغيره مستقبلا كان كالامر اوحالا كالمضارع
كذافي النهر الفائق -

Similarly the Vekayaturrivayah states that " If a woman says to a man or a man to a woman. 'I have married you' and the other says 'I have accepted the marriage, here both the words denote the past tense. If the woman says to the man 'make me your wife, and he replies 'I made you my wife' Here the first word is in the imperative (in future tense) and the other in the past tense."

وقاية الروايه
وهو ينعقد بايجاب وقبول لفظهما
ماضي كزوجت و تزوجت او ماضي
ومستقبل كزوجني فقال زوجت -

Hence it is not necessary that the words of declaration and consent should be in the past tense. Marriage does not depend on the use of any express terms, it may be lawfully contracted when the intention of the consenting parties is clearly established, and conveys the sense directly of the intended matrimonial contract, and according to the Durar-ul Ahkam the proposal and acceptance may by expressed in any language known to the parties.

Both the Sunni and the Shiah agree that a marriage can be lawfully contracted by the use of the words *nikah* and *tazwij* which imply matrimony, and that a marriage cannot be contracted by using the expression *ijara* (lease) or *ariyet* (loan). According to the Fatawa Alamgiri, " Marriage is not contracted by the word *ijarat* or hiring *ariyet* or lending, *ibahat* or permitting, *ihlal* or legalising, *tumuttu* or enjoying, *ijazat* or allowing, *raza* or being content, and the like. Nor by the words *sulh*, compounding and *buraat* releasing, nor by the words *shirkat* and partnership, and *itak* emancipating, nor by the word *wasiat*, bequeathing."

As regards the words, *hiba* (هبه gift), *bai* (بيع sale), and *tamlik* (تمليك appropriation) it has been held by the jurists that they sufficiently

1. *Ameer Ali, Mahommedan law P.* 331.

convey an expression of intended matrimonial contract. There is some difference as to the words *karz* (قرض lending), *rahn* (رهن pledging), but by a liberal interpretation of the doctrine of Istehsan of Imam Abu Hanifa it has been held as valid. Under the Shiah law all marriages contracted without the words *nikah* or *tazwij* are invalid but if consummated the law attaches to them all the legal incidents of a valid contract.

The Prohibited circle.

A proposal of marriage may be made to any woman except those forbidden.

The causes of prohibitions are nine in number.

(1) Karabat *i. e.* consanguinity (2) Musaharat *i. e.* Affinity (3) Fosterage (4) joining together (5) ownership (6) Shirk (*i. e.* infidelism or polytheism) (7) Calling a slave girl over a free woman (of these there are seven illustrations.)

درالمختار

اسباب التحريم انواع - قرابة مصاهرة رضاع جمع ملک شرک اوخال امة على حرة فهي سبعة ذكرها المصنف بهذا الترتيب وبقي التطليق ثلاثا وتعلق حق الغير بنكاح اوعدة ذكرهما في الرجعة -

(8) The triple divorced wife

(9) The existence of the lawful right of another man in virtue of marriage or Iddat. *e.g.* a married woman or a woman observing Iddat."

The prohibitions are either absolute (perpetual) or temporary.

The causes that produce absolute prohibition arise by reason of consanguinity, affinity and fosterage while other prohibitions are temporary.

The distinction is drawn merely to illustrate that as regards consanguinity, fosterage and affinity; the physical conditions on which prohibition rests are permanent and it lasts for ever, while in the other classes subsequent events can put an end to the duration of physical conditions, and thus render marriage valid. In other words while a man can never lawfully marry with knowledge a woman perpetually prohibited, he has a chance of lawfully marrying a woman temporary prohibited after the supervening illegality has been removed. The legal result of marrying a woman whether perpetually or temporarily prohibited with knowledge of its unlawfulness is the same, *e.g.* the marriage in both cases is *batil*, void ab initio.

The Koran enumerates the forbidden degrees thus.

"You are forbidden to marry your mothers and your daughters and your sisters and your paternal aunts and your

Part. IV. Ch. IV.

حرمت علتكم امهتكم و بنتكم و اخوتكم و عمتكم و خلتكم و بنت الاخ وبنت الاخت وامهتكم التي ارضعنكم و اخوتكم من الرضاعة وامهت نسآءكم

maternal aunts and brother's daughters and sisters' daughters and your mothers that have suckled you and the foster-sisters and mothers of your wives and your stepdaughters who are in your guardianship, (born) of your wives unto whom you have visited, but if you have not visited them, there is no sin (in marrying them) and the wives of your sons who are of your own loins and that you should have two sisters together except what has already passed; for Allah is forgiving and merciful."

وربائبكم التي في حجوركم من نساء
ئكم التي دخلتم بهن فان لم تكونوا
دخلتم بهن فلاجناح عليكم وحلائل
ابنائكم الذين من اصلابكم وان تجمعوا
بين الاختين الا ما قد سلف ان الله
كان غفوراً رحيماً -

"And forbidden to you are all married women."

Part IV. Ch. IV,

والمحصنات من النساء

Part IV. Ch. IV.

"And do not marry women whom your father's married except bygones for this is abominable, sinful and an evil custom."

ولا تنكحوا ما نكح اباؤكم من النساء
الا ما قد سلف انه كان فاحشة ومقتا وساء
سبيلا

A person is thus prohibited to marry.

Consanguinity.

1. His own ascendants how-high-soever and his own descendents, how low soever.
2. His fathers or mother's descendants, how low soever.
3. The brothers or sisters of any ascendant, how high soever.

A person is prohibited to marry.

Affinity.

1. Mother-in-law, how high soever. 2. Wives' daughters, how low soever. 3. Son's wife, how low soever 4. Step-mothers.

This provision is applicable to both men and women. In short a person who has consummated marriage, or who had an adulterous intercourse is forbidden to her female ascendants and descendants and his ascendants and descendants become forbidden to her.

The rule of law as to adulterous intercourse is accepted by the Hanafi, Hanabli and Shiah, but not by the Shafi and further according to the Hanafi and Hanbali " undue familiarity " between a man and woman has also the same effeet.

The Fatawa Alamgiri says.

"A man who had illicit connection with a woman then he cannot marry her mother or her daugher and the woman herself is forbidden to his father and his son."

فتاوى عالمگيرى -

فمن زنى بامرأة حرمت عليه امها
وان علت وابنتها وان سفلت وكذا تحرم
المزني بها على اباء الزاني واجداده
وان علوا وابنائه وان سفلوا -

According to the Fatawa Kazi Khan "If a man touches a woman with desire (undue familiarity) then prohibition of "Musharat" is established."

فتاوى قاضي خان

ولومس امراة بشهوة فامذي اونظرا
لي فرجها فامذي يثبت حرمة المصاهرة-

Hurmat-i-Musharat does not arise only in the case of marriage, it arises with some relations on marriage and with some only on co-habitation after marriage; *e.g.* If A contracted a marriage with B. than B's mother is prohibited even if B is repudiated before co-habitation,[1] but in this case marriage with the daughter of B is lawful.

The author of Durrul Mukhtar Says "Marriage with a daughter of the wife with whom co-habitation has taken place becomes unlawful owing to Musharat but the mother, the paternal and maternal grandmothers of the wife become unlawful merely by contracting a valid marriage even though co habitation with the wife may not have taken place, and it has been held that co-habitation with the mother renders daughters unlawful and vice versa."

درالمختار

وحرم بالمصاهرة بنت زوجته الموطوءة وام زوجته وجداتها مطلقا بمجرد
العقد الصحيح وان لم توطء الزوجة
لما تقرر ان وطء الامهات يحرم البنات
ونكاح البنات يحرم الامهات -

According to the Durrul Mukhtar marriage is prohibited by reason of fosterage similar to natural relationship, subject to exceptions.

Fosterage.

درالمختار

وحرم الكل مما مر تحريمه نسبا و
مصاهرة رضاعا الا ما استثنى في بابه

The Shiah jurists hold that marriage is forbidden for fosterage in the same degrees as in the case of consanguinity, but the Sunni admit a few recognised exceptions.[2]

(i) The marriage of the father of the child with the mother of his child's foster mother; (ii) With her daughter.

(iii) The marriage of the foster-mother with the brother of the child whom she has fostered. (iv) The marriage with the foster-mother of an uncle or aunt.

It is reported in the " Muslim " that Ali asked the Prophet to marry Hamza's daughter. The Holy prophet declined on account of fosterage and observed.

"Hamza is my brother on account having been suckled by the same nurse.

مسلم

ران حمزه اخي من الرضاعة وان الله

1. *Karim Bakhsh v. Must Mukabor (1917) 52 Punjab Records 58 (No, 66).*

2. *Ameer Ali Mahommedan Law Vol. 11 P. 318.*

Verely God has made unlawful for the child his wet-nurse her daughter etc., in like manner, as he had forbidden marriage between near relations."

حرم من الرضاعة ما حرم من النسب -

It is reported in the Bukhari that Ukbah-bin Haris had married a woman and later on came to know that his wet-nurse, had suckled his wife. Thereupon the Prophet asked him to cancel this marriage with which he complied immediately.

Polytheism.

Polytheism and Heathenism are impediments to marriage. The Holy Koran says.

Part II. Ch II.

"Do not marry the Mushrakeen (non-believers) until they believe.... and do not give Muslim women in marriage to the Mushrakeen until they believe."

ولا تنكحوا المشركات حتى يؤمن..
....ولا تنكحوا المشركين حتى يؤمنوا

The author of Durrul-Mukhtar explains the words "Mushrakeen" thus:—

"No Muslim can validly contract marriage with fire-worshippers, or star-worshippers and whose religion is not based on a holy book."

در المختار
لايصح نكاح عابدة كوكب لا كتاب لها والمجوسية - والوثنية -

An exhaustive list is enumerated consisting of worshippers of the sun, stars and images, and the "Zunadook (Sadducee considered an atheist), Bataniah (the same as the assassins mentioned in the Crusades), Abahiah (an Antinomian sect), Moobuyyizzoh (a discredited Muslim sect), Mooutillah (who adopt the dogma called Tateel which consists in divesting the essence of the Deity of every attribute, and reducing it, in some sense to nothing.)"[1]

If an infidel marries a Muslim woman then the marriage is void ab initio and parentage is not established.[2]

"If an infidel marries a Muslimah and children are born; then parentage is not established as the marriage was *batil* (void)."

رد المحتار
نكح مسلمة فولدت منه لايثبت النسب منه ولا تجب العدة لانه نكاح باطل

The same view is expressed in the Durrul-Mukhtar and Bahr, but according to the Muhit if cohabitation has taken place iddat is necessary and parentage is also established, but separation should be effected. Some jurists argue that if a Muslim marries an infidel the marriage is considered as invalid, as it is possible for the woman at any time to be converted to Islam, and thus validate the marriage.

1. *Baillie's Digest of Moohummedan law P, 41.*
2. *Himat Bahadur* v, *Sahebzadee 14 W. R. 125 (1870)*

Ameer Ali adopts the latter view[1], but it is difficult to reconcile it with the direct Koranic prohibition[2].

A Sunni Muslim is permitted to marry " Ahl-kitab " believers of revealed religions. No precise definition of " Ahl-kitab" is given, and it is universally believed that the followers of all prophets mentioned in the Koran are "Ahl-kitab" *i. e.* the Jews, Christians etc. Under the Shiah law a "kitabia" could only be married by the *muta* form of marriage(temporary union), but the Usuli Shiah and the Mutazalas agree with the Sunni and allow permanent marriages with the "kitabias".

Ameer Ali is of opinion that as marriages were allowed between the Muslims and the *Ahl-ul-Hawa* (free-thinkers), the Sabaens, and the Zoroastrians, a Muslim could lawfully marry a Brahmo or a Hindu woman. He cites that the Moghul Emperors of India frequently intermarried with the Rajpoot (Hindu) ladies and the issues of such unions were regarded as legitimate and often succeeded to the Imperial throne".[3]

The view prohibiting a Muslim woman to marry a non-muslim is possibly based upon political considerations, as such a marriage may lead to the introduction of idolatry and to the conversion of the Muslim woman herself.

1 *Ameer Ali Mahommedan Law vol. II P 235.*

2. *Baillie says (Digest P. 42) "If a Mooslim marry a kitabeeah and she becomes a Majooseah she is unlawful to him, and the marriage with her is dissolved"*

3. *Ameer Ali Mahommedan Law Vol II P. 183. "A marriage between a Moslem and a non-Moslemah celebrated in a foreign country is valid under the Mahommedan Law, if it is perforwed in accordance with the requirements of the lex loci contractus or the rites of the communion to which the wife belongs."*

BATIL AND FASID MARRIAGES.

The prohibition of the woman is an interesting but a complicated subject in the Muslim Matrimonial law. Ameer Ali opens this subject thus. "No part of the Mussulman law is perhaps more difficult to apprehend than the rules that relate to connections which, although not regarded as quite valid (*sahih*), give rise, on consummation, to some of the consequences resulting from a valid marriage."[1] The French writers assign the name of *semblable* contracts to such defective unions. Baillie classifies it as invalid marriages[2].

Baillie quotes a wide dictum of Abu Hanifa which is opposed to the view of the Sahibain. The Great Imam said. "All the daughters of Adam being qualified for procreation, which is the primary object of marriage, are fit subjects for that contract "[3]. It has been argued from this hypothesis that a man may marry a prohibited woman—an unwarrantable conclusion. This passage occurs where the Imam was discussing *hudd* (punishment of 100 stripes for illicit intercourse), and he expressed an opinion that a contract of marriage is a sufficient ground of error to avert the punishment of *hudd* in all cases, but the man is liable for a discretionary punishment *tazeer*. The Sahibain Imam Yusuf and Muhammad differed and the *fatwa* with the concurrence of the "Ulema" is according to their view, they held that if a man was sensible of the unlawfulness of the marriage then the contract of marriage is no defence. But if he were ignorant of the fact of illegality of marriage then it averts punishment. Imam Abu Hanifa was discussing an abstract question as regards women and not with reference to any man. The author of Bahr points out the fallacy of taking advantage of this dictum of Abu Hanifa.

"Imam Abu Hanifa in calling her 'a fitting subject' intended to say that she was a fitting subject in the abstract and not in particular to any man. Hence he says a woman is fit for the end of marriage *i. e.* procreation. This is not inconsistent with the view of jurists that prohibition against marriage with maharim means that they are not fitting subjects of marriage;

بحررائق -
الامام حيث اثبت محليتها للفس
العقدلابالنظرالى خصوص عاقد ولداملل
يقبولها مقاصده ولاينا فيه قول الاصوليون
ان النهي عن نكاح المحارم مجاز عن
النفى لعدم محله ولا قول الفقهاء ان
محل النكاح الانثي من بنات آدم
التي ليست من المحرمات لانهم ارادوا
نفى المحلية بعقدالنكاح الخاص -

for the jurists mean that a fitness for marriage with a particular man is

1. *Mahommedan Law Vol. II. P. 368.*
2. *Digest of Moohammadan law Bk1 Ch VIII.*
3. *ibid P. 151.*

negatived nor is the juristic view inconsistent with the opinion that a woman in capacity of a daughter of Adam is a fitting subject of marriage."

The Muslim Jurists thus adopt a safe rule that a marriage contracted with a knowledge of its illegality on the part of the parties is *batil* null and void ab initio, but where it is otherwise, that is without knowledge of its unlawfulness, it is a *fasid* marriage *i. e.* invalid and the issues are regarded as legitimate, and in this connection the doctrine of "Shuba" (doubt) plays an important part. Baillie unfortunately lost sight of this view when he said that, "At first sight, then, it would seem that whenever a Mooslim intermarries with any woman that it is unlawful for him to marry, the marriage is void, according to Aboo Yusuf and Moohummûd. But the reason which is assigned for their opinion that the woman is not a fitting subject for the contract is that she is of the *muhrumat.* Now this term is synonymous with *mooharim,* both words being plural forms of the same singular ; and it might, therefore, I think, be fairly inferred that it was only of *mooharim,* or women perpetually prohibited to a man—in other words, those who are prohibited to him by reason of consanguinity, affinity or fosterage—that the author of the *Hidayah* meant to assert that connection with them, though under the sanction of marriage would expose the parties to *hudd,* in the opinion of Aboo Yousuf, Moohummud, and Shafei."[1]

In other words Baillie draws a fine distinction, that is a marriage contracted within the absolute perpetual prohibited degree is always *batil* null and void ab initio, while a marriage contracted within the temporary prohibited degree is *fasid* invalid only, and the issues are regarded as legitimate. Ameer Ali unconsciously comes to the same conclusion, " Connections which are unlawful in themselves are null and void *ab initio* (*batil*) and create no civil rights and obligations between the parties." ...... "Marriages, which are not vitiated and rendered illegal by a radical defect of the character above described, stand on a different footing. In such cases also, if consumnation has taken place the children conceived and born during the existence of the contract are legitimate. But whereas all marriages between two persons who are perpetually interdicted to one another by reason of consanguinity, affinity or fosterage are illegal and void ; the other unions* are merely invalid, for the supervenient objection may be removed at any time."[2]

But the Muslim law maintains no such distinction between perpetual and temporary prohibitions, if the marriage in either case is contracted

1. *Digest of Moohummadan law, P. 152.* 2. *Mahommedan law Vol II P. 389.*

with the knowledge of its illegality and unlawfulness, it is *batil,* null and void ab initio. The consensus of the learned is on the unlawfullness of a marriage with knowledge of its illegality, it is not on the basis of perpetual and temporary prohibition. The possibility of mere change in temporary prohibition cannot alter the legal effect at the time of the marriage. Prohibition against a woman deprives her of the character of being a fitting subject of marriage, and renders the contract void ab initio.

Our jurists did not intend a distinction between perpetual and temporary prohibition so as to result in varition of the legal consequences of such marriages. What makes the marriage void is the factum that the woman is undoubtedly prohibited by law. The Holy Koran itself makes no such distinction and in the same passage mentions prohibitions such as mother, sister, daughter etc., and marriage of two sisters at the same time or of....another's wife. Thus it shows that as regards prohibition "another's wife" stands on the same footing as one's own mother or daughter.

The Kashf says that the Koranic prohibition does not only make sexual intercourse unlawful, but takes away from the prohibited woman the character of its being " a fitting subject of marriage."

"The *nahi*(prohibition in the Koran) means *nafi* because a fitting subject of marriage does not exist. The command of God makes the woman herself unlawful and when unlawful is predicate of substance it makes that substance an unfit subject in itself because lawfulness and unlawfulness cannot co-exist in one subject at one and the same time."

كشف

لي محمول علي النفي لعدم محلة لان النص الوارد فيه يوجب تحريم العين والحرمة متي اضيفت الى العين اخرجتها من محلية الفعل لان الحل والحرمة لايجتمعون فى محل واحد فكانت اضافة الحرمة العين نفيا للمحل لانهيا -

The author of Taudih proceeds more logically.

"When it is admitted that marriage is prohibited, it follows that prohibition makes it void. The effect of prohibition is to create unlawfulness (hurmat) and inasmuch as marriage makes cohabitation lawful and as lawfulness itself is taken away in virtue of prohibition the contract of marriage becomes *batil* void ab initio."

توضيح

ان سلم ان النكاح منهى فان نهيه يوجب البطلان لانه لاخلاف فى ان النهي يوجب لحرمة والنكاح عقد موضوع للحل فلما انفصل عنه ماوضع له وهوالحل يكون باطلا -

The celebrated book Majmael-anher points out that in marriage the duration of physical conditions is immaterial. In other words the distinction between perpetual and temporary prohibitions cannot differentiate fundamental legal consequences.

"*Hurmat*, unlawfulness, may be taken to mean the state of being *batil* or being *fasid*. But this difference does not exist between them in application to marriage, and it is so stated in the majority of reliable books."

مجمع الانهر
الحرمة تجوزان تفسر بابطلان و الفساد لانه لافرق بينهما في باب النكاح كما فى اكثر المعتبرات -

The Jamae-ur Rumuz or Kohistani is of the same opinion.

" It is possible that unlawfulness be explained by the terms *fasid* and *batil*, but there is no difference between *batil* and *fasid* in its application to marriage."[1]

If merely the factum of temporary character of the physical conditions makes the marriage with a woman not void, but invalid only then the issue of an admittedly unlawful intercourse under the false colour of marriage would be ligitimatised. This is opposed to the fundamental conception of the Muslim law as the issue should be conceived in lawful wedlock and born not within less than six months of the date of marriage. Under the Muslim law a subsequent marriage cannot legitimatised a child of antecedent adulterous intercourse, and it applies equally to invalid marriages contracted with knowledge of its unlawfulness.

It is possible that the rule legitimation per subsequens matrimonium influenced Baillie to draw this fine distinction to make the issues of a marriage contracted with a woman temporary prohibited in every case legitimate and surnaming it as "invalid marriage." However there is no authority for this view in the Muslim law.

The Muslim jurists maintain no such distinction. The Fatawa Alamgiri considers all prohibition alike.

"Another's wife and his divorced wife and the wife divorced three times before she marries another are like a maharim(e. g. on the same footing like ones own mother or sister)."

فتاوى عالمگیری
ومنكوحة الغير و معتدته ومطلقة الثلاث بعد الزوج كالمحرم -

1. *Referred in 23 Cal. P. 130-158 and 41 Bom. P. 485-488.*

THE DOCTRINE OF SHUBA.

The doctrine of "Shuba" which has been translated as "error or doubt" plays an important part in dropping as a consequence the punishment of *hudd*, and in establishing parentage. The Hanafi jurists appear to classify women with reference to an individual in three classes.

1. Women with whom sexual intercourse is permissible by law.

2. Women with whom sexual intercourse is prohibited by law.

3. Prohibited women with whom sexual intercourse takes place under a bona fide doubt.

The third classification was necessitated by the clemency of the jurists to avert the punishment of *hudd*, and establish parentage. It was the natural outcome of a well known tradition. The Prophet declared, "Remit punishment in all cases of doubt." It is the result of toleration towards the issues born of invalid marriages.

"The *nasab* of a child born of a woman enjoyed in an illegal marriage is established (in the reputed father), because in this regard is had to the child's preservation since if the descent were not to be established, the child might perish for want of care."[1]

The Hanafi jurists classify "Shuba", doubt, thus:—

1. A doubt in the Act. 2. A doubt in the woman.

The Fathul-Kadir says.

"A doubt in the Act is known as "Shuba-Ishtiba and Shuba-Mushaba." It is excusable mistake for a person who is under a bona fide doubt. A doubt in the woman is known as 'Shuba—Hukima and Shuba—Milk.' It exists because of some authority which makes the woman unprohibited."

فتح القدير

واصحابنا قسموا الشبهة قسمين
شبهة في الفعل وتسمى شبهة اشتباه
وشبهة مشابهة اے شبهة في حق من
اشتبه فى المحل وتسمى شبهة حكمية
وشبهة ملك اے الثالث شبهة حكم
الشرع بحل المحل ۔

According to the Mohit the doubt is of three kinds.

1. Doubt in the Act.
2. Doubt in the woman.
3. Doubt due to marriage.

وفي المحيط الشبهة ثلثه شبهة في
الفعل و شبهة فى المحل........
و شبهة في العقد ۔

1. *Hamilton's Hedaya (Grady) P. 53.*

The celebrated Hedaya[1] has summarised the law of doubt thus.

"Error in respect to the act exists in eight several situations; namely with.—

i The female slave of a man's mother.

ii The female slave of his father.

iii The female slave of his wife.

iv A wife repudiated by three divorces, who is in her Edit.

v A wife completely divorced for a compensation, and in her Edit.

vi An-Am-Walid, who is in her Edit after emancipation with respect to her master.

vii The female slave of a master with respect to his male slave.

viii A female slave delivered as a pledge, with respect to the receiver of such pledge (according to the Rewayet. Saheeh in treating of punishment), and it is to be observed, that a borrower in this point stands in the same predicament with the receiver of a pledge.

And there is no punishment in either case.

—And in all these situations the person who has carnal conjunction does not incur punishment, provided he declare.—

I conceived that this woman was lawful to me"—but if he should acknowledge his consciousness that the woman was unlawful to him he incurs punishment."

" Error in respect to the subject exists in six situations; namely with.—

i The female slave of a man s son.

ii A wife completely repudiated by an implied divorce.

iii A female slave sold, with respect to the seller, before the delivery of her to the purchaser.

iv A female slave Mamhoora—(that is a slave stipulated to be given in dower to a wife)—with respect to the husband, before seisin of her being made by the wife.

v A female slave held in partnership, with respect to any of the partners.

vi A female slave delivered in pledge with respect to the receiver of such pledge, according to the book of pawnage.

—And in all those situations a person who has carnal connexion does not incur punishment even though he should confess his consciousness of such woman being unlawful to him."

1. Hamilton's Hedaya (Grady) p. 182.

The Muslim jurists discussing the law of legitimacy in sexual intercourse of such doubtful nature hold that such kinds of "Shuba" which give the benefit of doubt to the man are quite sufficient to establish legitimacy. And accordingly if the doubt is "in the act" the issue is illegitimate and if "in the woman" the issue is legitimate. The Hedaya and the author of Bahr express the same opinion.

"Parentage is establised in cases of 'doubt in the woman' provided the natural father claims the child but it is not established in cases of 'doubt in the act' though he claims it, because the act in the latter case is pure whoredom although punishment drops inasmuch as there is doubt in his mind. The act is not whoredom in the former case because there is a doubt in the woman."

بحررائق
اى يثبت النسب في شبهة المحل بالدعوة ولا يثبت فى شبهة الفعل وان ادعاة لان الفعل تمحض زنا في الثانية وان سقط الحد لامر راجع اليه وهوا اشتباه الامر عليه ولم تمحض في الاولي الشبهة فى المحل -

The creation of a doubt in the woman amounts "to an ignorance of fact." Hence in other words the Muslim law considers "ignorance of fact" as sufficient excuse, but is ignorance of law also an excuse? *e. g.* if a Muslim did not know that it was unlawful to marry two sisters or another's wife. It appears that the Hanafi jurists maintain that ignorance of law is not an excuse. It is presumed that every Muslim in Dar-ul-Islam knows the laws of the land. To this extent the maxim "Ignorantia juris non excusat" applies to the Muslim law.

"When the law is promulgated in Dar-ul-Islam the mission of the law giver is complete, and a person who remains ignorant of the law is due to his own negligence and not to the non-publicity of the law, and hence his ignorance is not excusable."

اصول بزدوي حاشيه كشف
فاما اذا انتشر الخطاب في دارالاسلام فقدتم التبليغ من صاحب الشرع فمن جهل من بعد فانما اتي من قبل تقصيرة لامن قبل خفاء الدليل فلا يعذر -

Let us consider the following cases.

(1) If a man marries his mother or sister or one within the perpetual prohibited degree.

(2) If a man marries another's wife.

(3) If a man marries two sisters at one and the same time or one after another.

(4) If a man marries without the presence of witnesses.

(5) If a man marries a fifth wife having already lawfully contracted four marriages.

Marriage with maharim.

(1) If a man marries his mother or sister or one within the perpetual prohibited degree then the marriage is either *batil* or *fasid*. In reference to these, Ameer Ali says "Certain women were under no circumstances fitting subjects of marriage to a man; *they were absolutely prohibited to him and he could have no relations with them either as wife or bonds woman.*"[1] According to Baillie[2] and apparently Ameer Ali[3] marriage thus contracted is always *batil* void ab initio and the issues are illegitimate. But according to the opinion of the Hanafi jurists in all cases the criterion is whether the marriage was contracted with knowledge of its illegality and unlawfulness, if so it was void otherwise it is invalid and parentage is established, but the moment the factum of relationship is known, the parties must be separated instantly, if unwilling then it is the duty of the Kazi to cause separation. The author of Anqarvi proceeds to explain the effect of such *fasid* marriages in respect of the payment of dower and *hudd*.

"If a man marries a woman so related to him by blood *e. g.* mother, daughter, sister, paternal or maternal aunt, or marries the wife of his father or of his son and cohabits with her; according to Imam Abu Hanifa he is not liable to punishment and should pay her dower. Abu Yusuf, Mahomed and Shafi say that if he were aware of the fact of blood relationship he is liable to *hudd* (punishment), and has not to pay her dower, but if he were ignorant of the fact that she was such a blood relation of his within the prohibited degree he has to pay her dower and there is no *hudd*."

انقروي

اذاتزوج بذات رحم محرم منه
نحوا لام والاخت والعمة والخالة او
تزوج بامرأة ابيه اوابنه ودخل بها
لاحد عليه في قول ابي حنيفه و عليه
مهر مثلها بالغا مابلغ وقال ابو يوسف
و محمد و الشافعي ان علم انها ذات
رحم محرم منه عليه الحد ولامهر عليه
وان لم يعلم كان عليه المهر ولاحد عليه
من اواخرباب المهر من الخانية ـ

According to Imam Abu Hanifa parentage is established in all invalid marriages and the issues are deemed legitimate, but the Sahibain differ and the *fatwa* accords with their opinion.

1. *Mahommtdan Law Vol. II P. 371.*

2 *Digest P. 150*

3. *But on page 376 (Mahommedan law Vol. II).* Ameer Ali has stated the law accorately. He says "In the case of a marriage contracted with a mahram (a person within the prohibited degrees) *with a knowledge of its illegality on the man only or on the part of both man and woman,* if there is consummation the woman is not entitled to any dower nor is she bound to observe the probation; but where it is otherwise, viz without knowledge of the illegality the observance of *iddat* becomes obligatory on her and she becomes entitled to some dower."

The Fatawa-Alamgiri says.

"If a Muslim marries his own maharim and children are born then according to Abu Hanifa parentage is established, and according to the Sahibain it is not established. The reason is that marriage according to Abu Hanifa is *fasid* while in their opinion it is *batil.*"

عالمگیری -
رجل مسلم تزوج بمحارمه فجئن
باولاد يثبت نسب الاولاد منه عند ابي
حنيفة رحمة الله تعالى خلافا لهما
بناء على ان النكاح فاسد عند ابي
حنيفة رحمة الله تعالى باطل عند
هما -

Another's wife.

2. If a man marries another's wife then inasmuch as another's wife is not "a fitting subject of marriage," such a marriage with knowledge of its illegality is void ab initio, and the issue of such union are illegitimate. The Koran says. "All married women are forbidden to contract Nikah." (Part IV Ch. IV)

It is stated in the Jawhara, "If a man marries another's wife and has intercourse with her, *Iddat* is necessary if he did not know her to be another's wife, and during the *iddat* she becomes prohibited to her former husband. But if the man was aware that she is another's wife then there is neither *iddat* nor is the woman prohibited to her former husband because in this case the sexual intercourse amounted to whoredom."

جوهره
وان تزوج منكوحة الغير و وطئها
ان كان لايعلم انها منكوحة غيره تجب
العدة وتحرم على الاول الى ان تنقضي
العدة وان علم انها منكوحة الغير
لاتجب العدة ولا تحرم على الاول لانه
حينئذ ليكون زناء محضا -

Similar opinion is expressed in the Ankarvi, Raddul Muhtar and Kazi Khan goes a step further and includes a *muatadah* in the same category.

"According to all jurists it is not lawful to marry another's wife and one observing *iddat*. If a man marries another's wife without knowing her status and cohabits with her then *iddat* is obligatory. If he were aware of the fact then there is no *iddat* and the woman is not prohibited to her previous husband."

قاضي خان عالمگیری -
لايجوز نكاح منكوحة الغير ومعتدة
الغير عندا الكل ولو تزوج منكوحة
الغيروهو لايعلم انها منكوحة الغير
فوطئها تجب العدة وان كان يعلم انها
منكوحة الغير فوطئها لاتجب العدة
حتى لايحرم على الزوج وطؤها -

Consequently another's wife is not "a fitting subject of marriage," a marriage with her with the knowledge of the fact that she is another's wife is void *batil* ab initio and the issues are illegitimate.[1]

1. *8 A. L. J., p 953.*

3. If a man marries two sisters by one contract (a) at one and the same time, (b) one after another, then according to the Muslim law in the case (a) the contract of marriage is void and separation must be effected between the man and the two women; and in the case of (b) according to the particular circumstances the second marriage may be either *batil or fasid*.[1]

Two Sisters.

But if a man marries two sisters by two marriages and does not know which is the first, then the Kazi will separate him from them.

Whether the marriage is *batil* or *fasid* depends upon whether the marriage was contracted with the knowledge of its unlawfulness or merely in ignorance of actual facts respectively.

The Fatawa Kazi Khan says.

"Another of those classes is (that which relates to) the collection of two sisters in marriage, whether they be free women or female slaves; then if the husband has married them together (that is by one contract), the marriage with both is void (batil) but if he has married them consecutively (that is one after the other) the marriage with the first is valid and the marriage with the second is void (batil)."[2]

فتاوی قاضي خان
ومنها الجمع بين الاختين نكاحا
حرتين كانتا او امتين - ان تزوجهما
جملة بطلا - وان تزوجهما علي التعاقب
صح الاول وبطل الثاني -

The Fatawa Alamgiri says. "If the two sisters are married by two marriages, the second marriage is *fasid* (invalid), and it will be obligatory on him to put her away."[3] Thus while the Kazi Khan treats the second marriage as *batil* the Alamgiri calls it *fasid*. This difference is explained because the Fatawa Kazi Khan assumes that the man had knowledge of the fact of its unlawfulness when contracting second marriage.

In 23 Cal. (1896) p. 130, it was held that "the marriage with the sister of a wife who is legally married is void. The children of such marriage are illegitimate and cannot inherit." The Court observed :

"There is no doubt that under the Mahomedan law, in order to constitute a legal marriage the woman must be what is called a fitting subject or *mahal*. A woman whose marriage with a certain person is prohibited is not a fit subject of marriage as regards that person. Of such prohibited or forbidden woman there are several classes, as set out in

1. *Moulvi Mahomed Yusoof says (Tagore law Lectures Vol. II P, III) "If a man marries a waman and he afterwards marries her sister the marriage of the first is valid and that of the second is void (batil)."*

2. *Mahomed Yusoof Mahomedan law Vol. II P. III.*

3. *22 Cal., P. 159.*

Baillie's Digest Book I Chapter 3. In respect of some of these classes, the prohibition depends upon some disqualification inherent in the woman herself, as in the case of women related by consanguinity, affinity or fosterage. In such cases the disqualification being constant, the prohibition is said to be perpetual, and a marriage with a woman of such a class is admittedly *batil* or void, and the issue is admittedly illegitimate. But there are other classes of prohibited women in which the obstacle or impediment to a legal marriage is temporary only, being liable to be removed by some subsequent event. Among the instances which are given of such temporarily prohibited women are a polytheist who may subsequently be converted to Islam; a thrice repudiated wife who may become lawful again after marriage to, and divorce from, a second husband, and a woman who is observing her *Iddat*, after the death of, or after divorce from a former husband, and who would become lawful as soon as the period of the *Iddat* had expired. In these cases it is said that the marriage is not altogether *batil* or void, but only *fasid* or invalid; and in such cases the issue is generally acknowledged to be legitimate. Mr. Baillie, in Book I Chapter VIII of his Digest, discusses the distinction between void an invalid marriages ; but it is to be borne in mind that that chapter is not, and does not profess to be, like some other parts of his work, 'an abridged translation of the Fatawa-i-Alamgiri with occasional extracts from other authorities.' It is really, as the preface shows, a disquisition upon the subject by Mr. Baillie himself, and except so far as it is correctly based on translations from recognised authorities, it has no greater value than any other English text book. Nor, again, can the chapter in Mr. Ameer Ali's Personal Law, which treats of this subject (Part II Chapter 7), be implicitly relied on as a guide, inasmuch as the author appears to have been misled in places by Baillie's quotations from the original Arabic authorities."[1]

Ameer Ali has criticised this case rather seriously observing " the learned judges naturally imported English ideas into the consideration of the question and looked at it through English spectacles, for the English law as it stands regards the wife's sister as being within the prohibited degrees, and as one with whom a marriage is illegal even after the wife's death."[2]

It may be so; but it is possible that the decision was right. For according to the view submitted, if the marriage with the wife's sister was

1. *23 Cal. P. 139.*

2. *Mahommedan law Vol. II., p 382. (This is not the modern law.)*

contracted with knowledge of its illegality then undoubtedly the contract was void ab intitio and the issues were illegitimate, but if the marriage was contracted in ignorance of the fact that the woman was his wife's own sister then the marriage was invalid, and the parties should be separated, but the issues are considered legitimate. This is correct " Shara." The latest case 41 Bom., (1917) p. 485 has held the contrary. The court observed, "under the Mahomedan law the marriage with a wife's sister, during the subsistence of the first marriage is only *fasid* (invalid) and not *batil* (void). The issue of such marriage is legitimate and can inherit." However the criterion, upon which there is consensus of opinion among the jurists, is that the validity of marriage depends upon bona fide intention, and it is vitiated if to the knowledge of the contracting parties the *Nikah* was unlawful, and this view, explains both these conflicting decisions which have not laid down the correct law.

In ancient Arabia an Arab could lawfully marry two sisters and a tradition is reported by Zuahak bin Firoz.

He said, " O Messenger of God I have become a Muslim and have two wives that are sisters." The Prophet said. " Choose whichever of the two you like."

ابوداؤد
ومن الضاک بن فیروز الدیلمي
عن ابیه قال قلت یارسوالله اسلمت
وتحتی اختان قال اختر ایتهماشئت -

The Muslim law enjoins that there should be witnesses to a marriage contract.

without witnesses.

The Prophet of God declared.

" There can be no marriage without witnesses."

بقوله رسوالله صلي علیه وسلم
لانکاح الاشهود -

The witnesses should be adult muslims of sound mind. The author of Durrul Mukhtar says.

" It is essential that there should be two male witnesses or one male and two female witnesses."

الدرالمختار ·
وشرط حضور شاهدین حرین اوحرو
حرتین مکلفین سامعین قولهما معاً -

The Shafi insist that all witnesses should be males.

Under the Shiah law the presence of witnesses is not required, so if a marriage is contracted by the spouses themselves it would be valid in law.

According to Imam Malik witnesses are not essential, but marriage should be publicly made known. Under the Hanafi law if a marriage were contracted without witnesses then there is difference of opinion

among the jurists. According to some it is *batil* null and void ab initio others regard it as invalid (*fasid.*).

The celebrated Taudih advocates the strict view.

"As regards marriage without witnesses it is rendered nugatory by the saying of the Prophet that "there can be no marriage without witnesses" and hence such a marriage is void (*batil*)."

توضيح

وكذا النكاح بغير شهود لانه منفي بقول عليه السلام لانكاح الا بشهود اي يكون باطلا لانه منفي لامنهي ·

But it will be seen that there is a fine distinction between a marriage without witnesses and a marriage with a *maharim* or another's wife or with two sisters. Here the woman herself, is not a fitting subject of marriage and in the latter case marriage is prohibited till the supervening illegality is removed, while in the case of marriage without witnesses a woman is a fitting subject and the defect is in the procedure only. Hence the Raddul Muhtar says.

"It may be said for Samerkandi that a woman married by a *fasid* marriage means a marriage in which some condition is wanting, but in which the woman is a fitting subject e. g. a marriage without witnesses or a temporary marriage. But another's wife is not a fitting subject of marriage."

ردالمحتار

يمكن الجواب عن سمرقندى بانه حمل المنكوحة نكاحاً فاسدا على ما سقط منه شرط الصحة بعد وجود المحلية كالنكاح الموقت او بغير شهود اما منكوحة الغير فهي غير محل ·

Baillie takes advantage of disagreement between the jurists and cites this case with confidence. He says, "An invalid marriage is one that is wanting in some of the conditions of validity, as for instance the presence of witness."[1] Baillie though he is correct has not explained the difference between this and other kinds of defective marriages. Mr. Abdur Rahman treats such a marriage as void.[2]

Real Fasid marriages.

In the Zakhirat-ul-Ukba which is also known as Chulpi and is a commentary on the Sharh Vikaya we have an exhaustive list of *fasid* marriages. "The expression *fasid* marriage means such as marriage without witnesses, marriage of a sister during the iddat of another sister who has been irrevocably divorced, of a fifth wife during the iddat of the fourth wife."[3] In all these it is clear that the woman was a fitting subject and in the other case the supervening illegality was removed by the fact of the first sister being irrevocably divorced, but the third case still presents difficulties as the

1. *Digest, p 150.* 2. *Institutes Mussalman Law, p 14.*

fourth-wife was observing *iddat*, and the subsequent marriage would make her divorce irrevocable.

The author of Durrul Mukhtar cites some examples of *fasid* marriages.

"Re-expression "*e. g.* witnesses" and similar to it...... A marriage of a sister during the *iddat* of another sister, and marrying a woman observing *iddat* and a fifth wife during the *iddat* of a fourth wife."

در المختار
نكاح الاخت وعدة الاخت و نكاح المعتدة والخامسة في عدة الرابعة -

The Durrul Mukhtar in this very passage cites the case of two sisters as an example of *fasid* marriage but this view is erroneous. The Tahtavi adds one more instance e. g. a marriage of a *kafir* infidel with a Muslim woman and says no *hudd* will be inflicted on them and *nasab*, paternity will be established, but this is against the orthodox view which treats the marriage as void *batil*.

Hence the list of *real fasid* marriages is limited and it is impossible to add a single similar instance where there is consensus of opinion among the jurists.

Marrying woman in Iddat.

Under the Hanafi law a marriage during the woman's in *iddat* subsequent to divorce or after her husband's death is prohibited. But if contracted it is treated as a *fasid* marriage the husband and wife are to be separated and the issue, if any born is considered legitimate. After the expiration of *iddat* the parties can contract de novo a valid marriage. Under the Shiah law if cohabitation has taken place the woman becomes unlawful to the man in perpetuity[1]. Under the Maliki law such a marriage is also valid.

The reason for prohibiting a woman in *iddat* from marrying is to ascertain whether she is pregnant, and as the Hedaya says to avoid "confusion of blood."

Marriage with a fifth wife.

It is a fundamental doctrine of Muslim law that a man cannot have more than four wives. If he desires to marry another woman then he must divorce one of the four.

In ancient Arabia it was customary for the Arabs to have any number of wives, but on their conversion to Islam they were obliged to divorce all except four of them.

1. *Jamah-ush-shittat; Ameer Ali Mahommedan Law Vol. II, p 381.*

"It is reported from Ibn Omer that when Ghailan bin Salamahul-shkafi became a Muslim, in the days of his ignorance he had ten wives and they all became Muslims. Then the Prophet said, "Keep four and divorce the rest".

الترمذی

وعن ابن عمر ان غيلان بن سلمة الثقفي اسلم وله عشر نسوة في الجاهلية فاسلمن معه فقال النبي صلي الله عليه وسلم امسک اربعا وفارق سائرهن -

According to Muhommad and Zafar the man is at liberty to select any four out of the number of his wives, but Imam Abu Hanifa, Shafi, Malik and Hanbal held that the first four marriages are valid, and the rest should be separated.

Consequently if a man marries five women consecutively or a fifth wife then in either case the fifth marriage is not valid.

The Fatawa Kazi Khan says.

"If a man marries five women consecutively then the marriages of the first four are valid and the fifth one is void but if a man marries five woman by one contract then all of them are invalid."

فتاوى قاضي خان

اداذاتزوج الحر خمسا علي التعاقب جاز نكاح الاربع الاول ولايجوز نكاح خمسة - وان تزوج خمسا في عقدة فسد الكل -

Thus a fifth wife is expressly prohibited to a man whose four legally married wives are at that time alive. The Shara Vikaya and the Fatawa Alamgiri also say that it is not lawful for a man having four wives to marry the fifth.

The same principle was laid down in an old Indian case—Shumsoonissa *v*. Gouher Ali[1] that the Mahomedan law prohibits the marrying of more than four wives only in case all four are living.

But in Khurshaid Jahan *v*. Abdul Hamid[2] Mr. Justice Lal Chand quoted the above passage from the Fatawa Kazi Khan and remarked.

"The language used here is easily intelligible and means that if a free man marries five women consecutively, the marriage of the first four is valid, but the marriage of the fifth is not valid (or is invalid), and if he marries all four by one contract, the whole contract is *fasid*. The learned author of the Tagore law lectures has interpreted the word fasid here as meaning *batil* or void. This may or may not be so, but it is clear that in case of five consecutive marriages the word used is لايجوز *i. e.*, the fifth is not valid or is invalid."[3]

1. *4 Sel. Rep. S. D. A. P. 359 (1827)*
2. *(1908) Punjab Records, 43 (Judicial) No 6, p 43.*
3. *Ibid P. 52.*

His Lordship has misinterpreted لايجوز and the opinion of the Tagore law lecturer was correct. This word simply means "it is not lawful," and it is applicable both to invalid and void marriages.

The decision of the court was based on the distinction drawn by Baillie between void and invalid marriages, and thus the Court held contrary to the Hanafi law. "That according to Muhammadan law the marriage with a fifth wife in presence of four living wives is invalid, but not void and consequently the children of such marriage are legitimate and entitled to succeed as the lawful heirs to their father."

The learned judge relied (P. 150) on an illustration given by Ameer Ali as an example of invalid marriage *e. g.* "A marriage with a fifth woman." But the illustration given in the Raddul-Muhtar and also by Ameer Ali[1] is that of a marriage with a fifth wife during the *iddat* of a fourth. and, in this case the effect of fifth marriage will be as if irrevocably divorcing the woman (observing *idaat*) who had a chance of being united to her husband during the continuance of the period of *idaat*. It is quite distinct from marriage of the fifth wife during the life time of the four lawfully married wives. The view of Lal Chand J. is opposed to an obiter dictum of the Calcutta High Court,[2] where the Court observed, that "the authorities are indeed, agreed in saying that a marriage with a fifth wife during the *iddat* of the fourth after divorce is not void, but invalid only, but that is clearly intended to be an exception to tbe rule that a marriage with a fifth wife, while four other wives are in existence and none of them have been divorced, is absolutely void."

Macnaghten also discusses a similar case. He says[3]. "If it be established that a Moosulmaun did marry four women......a subsequent marriage with a fifth woman, is a fifth marriage and consequently invalid"; but herein Macnaghten confuses such a marriage with a proper invalid marriage, as he further continuing observes "but dower is due after the consummation of an invalid marriage......so also the parentage of the offspring of an invalid marriage is established in the husband." The latter portion if taken independently of its contents is absolutely correct, otherwise it is incorrect as no dower is due by a subsequent marriage of a fifth wife while the four lawful wives are alive or one of them has not been divorced, because such a marriage was

1 *Mahommedan law Vol. II P. 385 (3rd edition)*
It eeems Ameer Ali was misquoted by Lal Chand J.

2. *Aizunnisa Khatoon v. Karimunnisa Khatoon P. 130—144.*

3. *Macnaghten's Principles and Precedents of Moohummadan law P. 260.*

void ab initio. It is surprising that Ameer Ali comes to an erroneous conclusion; he has discussed this question rather casually. He says that "a contract of marriage with a fifth woman is invalid, if the marriage be consummated, though she should be separated from the man, *nasab* would be established and she would be bound to observe the iddat".[1] In other words Ameer Ali treats a contract of marriage with a fifth wife as *fasid* only, but this view is not supported by any authority.

Mr. Abdur Rahman correctly says "Any man having four lawful wives cannot marry a fifth until he has repudiated one of the four and waited until the period of *Iddat*, consequent upon such repudiation has expired."[2]

Pregnant woman.

As regards marriage with a pregnant woman, Imam Abu Hanifa and Muhammad held that under certain conditions such a marriage was lawful, but Abu Yusuf was of the contrary opinion. The Fatawa Alamgiri adopts the former view.

"It is unlawful to marry a pregnant woman when the author of pregnancy is known. But if a man marries a pregnant woman, then no co-habitation is permissible till delivery. However if the person who rendered her pregnant were to marry her then sexual intercourse is allowed."

فتاوی عالمگیری

وحبلی ثابت النسب لایجوز نکاحها
یجوز ان یتزوج امراة حاملا من الزنا ولا
یطاها حتی تضع ۔

The Shiah jurists agree with the Hanafi on this point and it is stated in the Jawahir-ul-Kalam that marriage during pregnancy under the above circumstances is valid.

Re-marriage with a thrice divorcee.

If a man marries a thrice divorced wife without her being married and divorced by another, and the requirements of law being fulfilled such a marriage is *batil*.

The Bahr says.

"If a man marries a thrice divorced wife while he and she knew that the marriage is invalid and she gives birth to a child....the marriage is the same as if he marries his own maharam (parentage is not established)."

بحررائق

تزوج المطلقة ثلاثا وهما یعلمان
بفساد النکاح فولدت......کما تزوج
المحرمه ودخل بها ۔

Mere marriage with a stranger would not be sufficient; there must be co-habitation. This disagreeable ordeal of a second marriage is by way of punishment for the man's conduct in irrevocably divorcing the woman.

1. *Mahommedan law Vol. II P. 397.*
2. *Institutes of Mussalman law P. 19.*

An indiscriminate use of the words *batil* and *fasid* has caused much confusion. Some jurists have used them synonymously. In legal *Batil Fasid* terminology *batil* signifies that no legal results follow from a void transaction, while *fasid* denotes that the act is not wholly devoid of legal consequences.

According to the Kashf the correct interpretation is as follows.

"The phrase *batil* when applied to devotional matters means that the act is not sufficient to exonerate the man from doing it, again; when applied to secular transaction it means that no legal consequences follow from a void transaction. According to the Shafi the term *fasid* is synonymous with *batil*. But according to our jurists *fasid* is a third class distinct from *batil* and also from *sahih* (valid) and it means that which is lawful in essence and unlawful as to its quality."

كشف

اماالبطلان فمعناه في العبادات عدم سقوطالقضاء بالفعل وفي عقود المعاملات تخلف الا حكام عنها وتجود ها عن كونها شيئا مفيدة الاحكام علي مقابلة الصحة والفساد مرادف البطلان عند اصحاب الشافعي , كلا هما عبارة عن معني واحد و عندنا هو قسم ثالث مغاير لاصحيح والباطل وهو ماكان مشرو عا باصلة غير مشروع بوضعه علي ماسهاني بيانه -

Thus according to our jurists *sahih* means that it is lawful both in its essence and quality and *batil* denotes that its unlawful both in its essence and in its quality. The legal consequences that follow are that there is no dower nor *iddat* in a *batil* marriage. According to the Raddul Muhtar.

The term *batil* means a marriage the existence or non-existence of which are alike. There is no *iddat* nor parentage established in a marriage with a *Maharim*."

ردالمحتار

المراد بالباطل ماوجوده كعدمه ؛ ولذا لايثبت النسب ولاالعدة في نكاح المحارم -

And again the Raddul Muhtar say. "There is no difference between *batil* and *fasid* in matters other than *iddat*, but as regards *iddat* the difference is clear."

لافرق بينهما في غيرالعدة امافيها فالفرق ثابت -

In a *fasid* marriage after co-habitation *iddat* and a customary dower becomes obligatory. If co-habitation has not taken place then no legal results follow. But in a *batil* marriage whether co-habitation has taken place or not there are no legal consequences as the existence and non-existence of marriage were alike.

The author of Majmael Anhar says,
And nothing that is the proper dower or the present *mutat* or *iddat* or maintenance is due without co-habitation in a *fasid* marriage.

مجمع لاانهر

ولا يجب شئي من المسمى ومهر المثل والمتعة والعدة والنفقة بلا وطئي في عقد فاسد -

MAHR—DOWER

In the Pre-Islamic era it was customary for the husband to settle on the wife "Mahr" (dower) and this institution in a "pure form" was sanctioned by the Koran and is known as "Sadak" in legal treaties.

The Koran Part IV ch. IV

"And give women their dowers freely" واتوالنسا صدقاتهن نحلة

Sir Roland Wilson says that dower is "a sum of money or other property......and personal services to be rendered by the husband to the wife, do not count as property for this purpose."[1]

Baillie defines dower to be "the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself, as opposed to the usufruct of the wife's person......Dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman."[2] Baillie also considers personal services as not a fit subject of dower.

Under the Muslim law dower arises out of agreement between the husband and wife or by operation of law and is an essential ingredient to a valid marriage, but the fitting subject of dower is not only confined to a sum of money or property; it includes personal services and other things. "It is not a token of respect for its subject the woman" the word woman is an incorrect translation of المحل "Mahal" it is really as the Sharah Vikaya points out a consideration of *Buza* or enjoyment of *Buza* (المهر عوض البضع) the private parts of a woman.[3]

On the authority of the story of Moses and Shoâb the Muslim jurists consider personal services as a fit subject of dower.

The Raddul-Muhtar says.

"Moses contracted a marriage with the daughter of Shoab, and the dower was that he should graze his sheep for eight years."

ردالمحتار
زوج موسى بنة علي ان يرعي له
غنمه ثمانية سنين -

The Fatawa Alamgiri observes and refers to the Nahrul Faik.

"If the dower be this that the husband's slave male or female, shall serve the wife, it is allowed, and it is quoted from the Mohit Sarakhsee

فتاوى عالمگيرى
ولوتزوجها علي خدمت عبده وامته
صح كذا في النهر لفائق ولوكان الزوج

1. *Anglo-Muhammadan law P. 115.*
2. *Digest P. 91.*
3. *Abdur Rahim (Jurisprudence P 334). "It is not a consideration proceeding from the husband for the contract of marriage, but it is an obligation imposed by the law on the husband."*

that if the husband be a slave then it is admittedly correct that his services to his wife should be considered as dower."

عبدا فلها خدمته بالا جماع كذافي
المحيط السرخسي -

According to the Durrul-Mukhtar services rendered to the guardian of the minor or to the master of a female slave are valid

"Marriage with a female slave or with a minor is lawful in lieu of services rendered by the husband to the owner of the female slave or to the guardian of the minor. The tradition of the Prophet Moses and Shoab serves as an illustration. Marriage is valid where any male or female slave of the husband is assigned for the service of the wife."

در المختار

ومفاده صحت تزوجها علي ان
ان يخدم سيدها او وليها لقصة شعيب
مع موسي كصحته علي خدمت عبده
اوامته -

The Prophet of God regarded a handful of dates on one occasion and pair of shoes on another as a sufficient dower.

It is reported in the Abu Daud.

That a person who gives two handfuls of dates or meal as dower, made his wife lawful for him.

ابوداود

من اعطي في صداق امراته ملا كفيه
سويقا اوتمرا فقد استحل -

Again in the Tirmizi it is reported "A woman of the tribe of Bani-Fazarah married with dower a pair of shoes. The Prophet asked her, 'Are you pleased to give yourself for these shoes.' She said 'yes', then the Prophet approved of the marriage."

الترمذي

ان امراة من بني فزارة تزوجت
علي نعلين فقال لها رسول الله صلي الله
عليه وسلم ارضيت من نفسك ومالك
بنعلين قالت نعم فاجازه -

Imam Shafi is clearly of opinion that personal services are fit subject of dower, but Imam Abu Hanifa observed, that "If a free man marry a woman, on the condition in return of serving her for a stated period (a year for instance) or of teaching her the Koran yet her proper dower is incumbent upon him."[1] But according to the Fatawa Alamgiri it is lawful to make instruction in the Koran the subject of dower.[2] The reason is that a woman is likely not to be in a situation to exact the services of her husband. It is violation of the requisite of marriage which is that the woman should serve and not the man. But this much is conceded that the tending of flocks and services of "a permanent nature" are valid and that menial services stipulated may be performed by another person

1. *Hamilton's Hedaya by Grady P. 47*
2. *Ameer Ali, Mahommedan law Vol II P. 481.*

free or slave as this offers no violence to the requisites of the contract.[1] Consequently it is incorrect to say definitely that dower is a sum of money or property as it may consist of services rendered with consent and other things of value (property, jewels) except wine and pork as they are *haram*.

Dower is considered by the Muslim law as a debt arising in its origin from the marriage tie. It becomes due by co-habitation, valid retirement or by the death of husband or wife.

The Durrul-Mukhtar and Fatawa Alamgiri are of the same opinion.

"Dower becomes due on co-habitation, valid retirement and death either of husband or wife"

درالمختار

ويتأكد عند وطي اوخلوة صحت من الزوج اوموت احدهما -

عالمگيري

المهر يتاكد باحدمعان ثلثه الد اخول والخلوة الصحيحة وموت احد الزوجين -

Under the Hanafi and Maliki law by valid retirement or *Khilwat-us-sahih* is meant the actual retirement of the husband and wife into the nuptial chamber for matrimonial intercourse. But if there is some legal or physical impediment to conubial intercouse, the retirement is not valid.

The Fatawa-Alamgiri places *Khilwat-us-sahih* in the same category as actual consummation in respect of some rights and duties arising from the marriage tie namely the confirmation of dower, paternity, *iddat* and maintenance but not as regards repudiation and inheritance.

Under the Shafi and the Shiah law actual consummation alone creates the rights and duties which spring from the marriage contract.

According to the Hanafi law the minimum dower is fixed at ten dirhems, and the Maliki law has fixed three dirhems as the lowest sum.

The Fatawa Alamgiri says.

All property moveable or immovable and its lawful usufruct can be subject of dower.

عالمگيري

المهر انما يصح لكل ماهو مال ملوم والمنافع تصلح مهرا -

Where no dower is fixed or it is stipulated that there should be no dower, nevertheless marriage is valid and the customary dower is obligatory.

The Hedaya says.

"A marriage is valid although no dower has been mentioned because literally *nikah* signifies a contract of

هداية

ويصح النكاح وان لم يسم فيه مهرألان النكاح عقد انضمام و ازدواج

1. *Hamilton's Hedaya by Grady P. 47.*

لغةً فيتم بالزوجين ثم المهر واجب
شرعاً ابانة لشرف المحل فلا يحتاج
الي ذكره لصحة النكاح وكذا اذا
تزوجها بشرط ان لامهر لها -

union which is fully accomplished by the marriage. The payment of dower enjoined by the law is merely a token respect for the "Mahal" therefore its mention is not absolutely essential to the validity of marriage, and for the same reason a marriage is also valid although the man were to contract on the special condition that there should be no dower."

In such cases the law presumes that *Mahr-i-misl* (the dower of her equals or customary dower of the wife with reference to her social status) is lawfully due. Baillie has correctly observed, "The proper dower of a woman is to be determined with reference to the family of her father, when on a footing of equality with her in respect of age, beauty, city, period understanding, religion, and virginity."[1] Her mother's dower is not taken into consideration unless she happened to be of her father's family *e. g.*, daughter of his paternal uncle

1. *Digest P* 95

PROMPT AND DEFERRED DOWER.

After the payment of dower a woman comes under the legal control of her husband. The non-payment of dower creates interesting legal effects, namely, the wife may refuse herself to her husband.

Baillie says "Though a husband should give his wife the whole of her dower except one *dirhem*, she may refuse herself to him, and he cannot demand back from her what she may have already received."[1] However there is no difficulty where the parties have explained and agreed how much of the *mahr* is to be prompt and what portion of it is to be deferred, but when nothing is mentioned in the contract of marriage, then according to the accepted view that portion should be declared prompt which is established by usage and custom with reference to the woman's status.

Macnaghten has said otherwise "where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand."[2] The Privy Council in Mirza Bedar Bakht's case[3] adopted this view as authoritative.

However, it may be noted that Macnaghten's exposition of the Sunni law by chance happens to lay down the correct principles of the Shiah law. According to the Shiah law the whole dower is considered to be prompt when there is no specification in the marriage contract.

Here is the full text of the Sharah Vikaya which I think misled Macnaghten. On reading the whole passage any one will be satisfied that Macnaghten's view does not represent the opinion of the author of Sharah vikaya. The Arabic expression (وان كان) itself denotes that the previous opinion is weak and as the passage says that the jurists preferred to follow the custom in this respect.

"If there is no specification as to dower being deferred or prompt, the wife has no right to refuse to cohabit with her husband until she receives the whole dower. This was concluded to be the direction by referring to the context, because when the text writers said, 'or so much of that kind of dower as may be prompt for similar woman according to custom without

شرح وقايه

ان لم يبين المعجل والموجل لايكون لها ولاية منع النفس لاخذ كل المهر فهذا الحكم قد فهم مما تقدم فانه اذ قال اوقدر مايعجل الي قوله ان لم يبين فتقييد ولاية المنع بقدر المعجل يدل بطريق المفهوم علي انه ليس لها حق المنع بقبض الزايد علي المعجل ولا خلاف فى ان التخصيص

1. *Digest P. 126.*
2. *Principles and Precedents of Muhammadan law Art. 22 P. 59.*
3. *Sutherland's Privy Council Vol. II P. 823, 19 W. R. 315 (1873)*

reference to 1/4 or 1/5, if the amount has not been specified. Consequently to limit the power of refusal until the non-payment of the amount of prompt dower, indirectly shows, that a woman has not this right in reference to more than the amount of the prompt part of the dower, and it is a principle, that the specification of a thing in the traditions shows the non-existence of what is not mentioned. But the text writers adopted this method with a view to show that there is a difference of opinion on the subject, and that which is specified by them is alone proper; because the later jurists have adopted it on the basis of custom, although the real principle is, that a woman has a right of refusal until she receives the whole dower, when there is no specification of prompt and deferred dower, because dower is the consideration of Buza. Consequently it is not binding on her to surrender herself, until she receives the whole of the consideration."

بالذكر في الروايات يدل على نفي
الحكم عما عداه لكن اراد التصريح بهذا
ليدل على انه مختلف فيه والمختار
هذا فان المتاخرين اختاروا هذا بناء
على المتعارف وان كان اصل المذهب
ان لها ولاية المنع لاخذ كل المهر اذا لم
يبين مقدار مهر المعجل والموجل لان
المهر عوض البضع فما لم نقبض كل
العوض لايجب عليها تسليم البضع -

The Hamavi expresses the correct opinion.

"If it has not been specified at the time of marriage, that the dower is to be prompt, both the status of the woman and the amount of dower are to be taken into consideration, with a view to determine what part of dower should be prompt, and this should be determined according to custom, and to the same extent the payment of dower should be directed."

حموي

اذا لم يذكر المعجل في العقد ينظر
الي المسمي والمرءة ان مثلها ومثل هذا
كم يكون منه معجلا وكم يكون منه
موجلا لمثلها فيقضي بالعرف ويومر
بطلب ذالك القدر -

The Fatawa Kazi Khan says:—

"If there is no specification as to dower being deferred or prompt, both the status of the woman and the amount of dower are to be taken into consideration in determining how much of such dower should be prompt. It is not necessary to allow one fourth or one fifth; but regard should be had to custom, because that which is established by custom is also regarded as established by the Muslim law."

قاضي خان

ان لم يبينوا شيئا ينظر الي المرءة
والي المهر المذكور في العقد انه كم
يكون المعجل لمثل هذه المرءة من
مثل هذا المهر فيجعل ذالك معجلا
ولا يقدر ذالك بالربع ولا بالخمس
وانما ينظر الي المتعارف لان الثابت
عرفا كالثابت شرعا -

The Mukhtasar Vikaya says.

"If there is specification as to the dower being deferred or prompt, such specification will be acted upon, but if there is no such specification, it will be regulated according to custom."

مختصر وقايه

المعجل الموجل ان بينا فذالك
والا فالمتعارف -

Macnaghten[1] relied on the Sharah Vikaya, but he has not correctly construed the passages of that book. The correct principle is that in such cases custom determines the prompt dower.

On this point Baillie has correctly laid down the Hanafi law:

"When nothing has been said on the subject, both the women and the dower mentioned in the contract are to be taken into consideration, with the view of determining how much of such a dower should properly be prompt for such a woman, and so much is to be *maoujjul* or prompt, accordingly, without any reference to the proportion of a fourth or a fifth; but what is customary must also be taken into consideration."[2]

Wife's right of refusal.

All jurists recognise the wife's right of refusal to her husband if her prompt dower has not been paid, and in like manner, her husband cannot prevent her from going out of doors, or taking a journey, or going on pilgrimage. According to Imam Abu Hanifa the same results follow even after the consummation had taken place. But on this point Abu Yusuf and Muhammad differed and held that after consummation the wife could not refuse herself to her husband unless the consummation had taken place against her will, or when she was young or insane. Baillie has not expressed a definite opinion on this point; but he appears to be inclined to adopt the view of Abul Kasim Saffar (as he calls him Sheikh-As-Suffar), who upheld the opinion of Abu Hanifa, in respect of the journey and as to connubial intercourse that of the Sahibain. However the correct view is that of Imam Abu Hanifa, as contended in the important law books the Bahrul-raik, Fatawa Sirajia, Fatawa Monia, Durrul Mukhtar etc.

Sir Roland Wilson in the 1st and 2nd edition of his Digest contended that reasons of justice and expediency, preponderated on the side of Abu Hanifa.[4] Ameer Ali also says that "the rule laid down by Abu Hanifa is recognised as law."[5] But the Allahabad High Court in the Full Bench case of Abdul-Kadir *v.* Salima[6] came to a different conclusion, and has since been followed by the Madras, Calcutta and the Bombay High Courts.[7]

1. *Principles and Precedents of Moohummudan Law Case XXX P. 280.*
2. *Digest P. 127.* 4. *Anglo-Mohammadan Law P. 121 (5th Edition)*
5. *Mahommedan Law Vol. II P. 497 Ameer Ali on P. 449 refers to a judgment of M. Samee Ullah Khan C. M. G. citing original texts (Must. Rasulan v. Mirza Naimullah Beg 1891) printed in the Indian Press Allahabad.*
6. *8 All., 149, which over-ruled its previous correct decisions, 1 All., 483, 2 All., 831.*
7. *11 Mad., 372. 17 Cal., 670, 30 Bom., 122.*

The Court observed "This claim may be used by her as a means of obtaining payment of the dower, and as a defence to a claim for co-habitation on the part of the husband without her consent: but although she may plead non-payment, the husband's right to claim co-habitation is antecedent to the plea, and it cannot be said that until he has paid the prompt dower his right to co-habitation does not accrue."[1] But according to the Muslim law this view cannot be maintained.

The Fatawa Alamgiri sets out in detail the juristic conflict on this point.

عالمگیری -

فی کل موضع دخل بها اوصحت الخلوة وتاكد المهرلوارادت ان تمنع نفسها لستيفا المعجل لها ذالک عنده خلافا لهما وكذا لايمنع من الخروج والسفر والحج التطوع عنده الا اذا خرجت خروجا فاحشا و قبل تسليم النفس لها ذالک بالا جماع وكذا اذا دخل بها وهي صغيرة اومكرهة او مجنونة فالاب حبسها حتى يوفي لها المعجل كذافى العنايه و لودخل الزوج بها اوخلابها برضائيها فلها ان تمنع تمنع نفسها من السفر بها حتى تستو فى جميع المهر علي جواب الكتاب والمعجل في عرف ديارنا عند ابى حنيفه وقالا ليس له ذالک وكان الشيخ الامام الفقيه الزهد ابوالقاسم الصفار يفتي في اسفر بقول ابي حنيفه وفي منع النفس بقولهما واستحسن بعض مشائخنا اختياره كذافي المحيط -

In all cases when the husband has had connubial intercourse, or validly retired with her the whole dower is confirmed. If she intends to deny herself to him for securing payment of her prompt dower, it is her right to do so according to Imam Abu Hanifa, but this is opposed to the opinions of his two disciples (Abu Yusuf and Muhammed). In like manner the husband cannot prevent her from going out and travelling, or going on a voluntary pilgrimage according to Abu Hanifa, except when she goes out in an indecent manner. As to her right to all this before she has surrendered herself there is unanimity of opinion. Similarly when the husband has had connubial intercourse with her whilst she was a minor, or was forced, or was insane, in which cases her father might refuse to surrender her, until the payment of her prompt dower. Thus says the Inayah. If the husband has had connubial intercourse with her, or retired with her with consent, it is her right to refuse to go on a journey, until her whole dower according to the written engagement, or the prompt part of it according to the custom of our country has been paid. This view is according to Abu Hanifa, but his two disciples maintain that she has no such right, and the Sheik-ul-Imam, the juris consult, the pious, Abul Kasim Saffar was accustomed, to decide according to Abu Hanifa so far as going on the journey was concerned; and in the matter of refusing herself according to the opinions of the two disciples, and *some of our* learned jurists have approved of this distinction: thus says the Mohit."

1. 8 All., 149.

In the Fatawa Hammadiah with reference to the Fatawa Mufti it is observed.

"Until a woman has received her dower to the last dirhem, she has the right to refuse herself to her husband, and she can go on a journey and out of her husbands house without his permission."

حماديه

من فتاوي المفتي لها المنع والسفر والخروج بلا اذن حتي تقبض جميع المهر وان بقي درهم -

And on the authority of the Tahzib it is said "she has power to deny herself to her husband till the payment of the whole dower on the analogy of sale, and she is at liberty to go on a journey wherever she likes, and to live any where before receiving her dower. Although she has once co-habited with consent with her husband, she has a right of refusal contrary to the view of the Sahibain......The approved view is that the wife possesses the right of refusal, if there has been ill-treatment on the part of the husband, and if it be the fault of the wife, then she has no such right."

حمادية

من التهذيب وللمرأة منع نفسها منه حتى تقبض جميع المهر وان تبقى درهم استدلالا بالبيع والثمن ولها ان تسافر وتسكن حيث شاءت قبل القبض ولو سلمت نفسها مرة طائعة لها المنع ابعد ذالك خلافا لهما... المختار عندي في المنع ان كان سوء المعاشرة من الزوج لها المنع وان كان من جهتها فليس لها المنع -

The Hedaya says.

"A wife has the right, until she receives the prompt portion of her dower to refuse to surrender herself to her husband, or to go with him on a journey......."

"If the dower be deferred the wife is not at liberty to refuse intercourse with her husband, as she has surrendered her right by agreeing to deferred dower, as in the case of sale, Abu Yusuf holds a contrary opinion. According to Abu Hanifa if the marriage has been consummated, then it would be to the same effect. The Sahibain say that the wife has no right to refuse. The difference of opinion is in the case where consummation has taken place with the consent of the wife. There is a consensus of opinion of all the lawyers that in the case of compulsion, minority or unsoundness of mind, she retains her right of refusal intact."

هداية

للمرأة ان تمنع نفسها حتى تاخذ المهر وتمنع ان يخرج بها اى يسافر بها.... ولو كان المهر كله موجلا ليس لها ان تمنع نفسها لاسقاطها حقها بالتاجيل كما في البيع وفيه خلاف ابو يوسف وان دخل بها فكذالك الجواب عند ابي حنيفة وقالا ليس لها ان تمنع نفسها والخلاف فيما اذا كان الدخول برضاها حتي لو كانت مكرهة اوكانت صبية او مجنونة لايسقط حقها في الحبس بالاتفاق -

The Bidaya makes this important point quite clear.

"A woman has a right to refuse to surrender to her husband, until she receives her dower and to prevent him from taking her on a journey, and the husband has no right to prevent her from going out of his house, or from visiting her relatives until the payment of the whole of the prompt dower.

بدايه

وللمرأة ان تمنع نفسها حتى تاخذ المهر و تمنع ان يخرجها وليس للزوج ان يمنعها من السفر والخروج من منزله و زيارة اهلها حتى يوفيها المهر كله ولو كان كله مؤجلاً ليس لها ان تمنع نفسها وان دخل بها فكذالك -

But if the dower be deferred the woman has no right of refusal. If cohabitation has taken place, then also the case is as stated in the above two cases."

Macnaghten[1] accurately discusses this interesting point in the form of a question and answer.

Question :—"Has a wife a right to oppose the inclination and resist the authority of her husband, before she has received her dower, notwithstanding the previous interchange of conjugal habits, without objection on her part?"

Answer :—" If it had been stipulated that a portion of the dower is to be paid immediately, she has a right to do so, with a view to obtain that portion of her dower. So also if no mention have been made of the immediate payment of any portion, she may do so, with a view to obtain such a portion, as may be consistent with her situation in life, unless the postponement of the payment of the whole had been expressly stipulated; according to the *Munnih-ool Ghuffar*,—'She is competent to preclude him from the enjoyment of conjugal rights, or from carrying her on a journey, or removing her from one house in a town to another, (although matrimonial intercourse may have passed between them and the marriage may have been consummated, without any objection on her part), for the purpose of obtaining a portion, or the whole, of the dower, prompt payment of which was stipulated, or for the purpose of obtaining such a portion of it, as is usually paid promptly to her equals in condition unless the payment of the whole was expressly postponed."

Imam Abu Hanifa's view has been adopted by the Courts in Egypt, and it is embodied in Art. 213 of the Egyptian Code. However there has never been conflict as to the right of wife's refusal before consummation, either of the Hanafi authorities or judicial decisions in India.

1. *Principles and Precedents of Moohummadan Law P. 281.*

It is lawful for the husband, or his father, or paternal grandfather to make during the subsistence of the marriage, an addition to the original dower. "The addition is not a gift, as supposed by Zoofr, requiring possession to render it complete, but an alteration of the terms of the contract in a non-essential matter within the power of the parties, and, like an addition to the price in sale, becomes incorporated with the original dower."[1] It becomes extinct if the woman is repudiated before consummation, and the original dower is itself halved. If addition is made during the *iddat* it is lawful, if it is made after the expiration of *iddat*, or after divorce it is of no effect.

Increase in dower.

Under the Muslim law an adult wife is competent to remit[2] her dower in favour of her husband, but she cannot be compelled to give up her dower. A father cannot remit his minor daughter's dower, or his adult daughter's dower without her consent.

Remission of dower.

The Holy Koran says. Part IV Ch. IV.

"Give women their dowry freely; but if they voluntarily remit unto you any part of it, enjoy it with satisfaction and advantage."

وآتوا النساء صدقاتهن نحلة - فان طبن لكم عن شيء منه نفسا فكلوه هنيأ مريا -

If the husband has specified a definite property as dower, and that property perishes while in his possession, then it is incumbent upon him to substitute things of a like nature or their value.

The Fatawa Alamgiri says.

"When the property for dower is specified, and it perishes while in the husband's possession, or is consumed by him, or another person establishes his right to it, then she can have recourse to her husband to deliver to her similar things or their value."

فتاوى عالمگيري

لوتزوجها علي شئي بعينه ، هلك قبل التسليم او استحق فان كان ذلك من ذوات الامثال رجعت علي الزوج بالمثل والا بالقيمة -

The lawful guardian of the husband or the wife can become surety for the dower with the approval of the wife herself, (or her guardian in cases she is a minor). The wife may claim the payment of her dower from the surety, or from the husband when he attains majority. However a father by merely marrying his minor son does not bind himself personally for the payment of dower, unless he becomes surety for the same.

Suretyship in dower.

1 *Baillie's Digest P. 111. The Shafi regard such addition as a gift.*

2 *Baillie's Digest P. 112 "If a woman should allow an abatement from her dower the abatement is valid....she should not be sick of her death illness at the time of giving her consent.*

As-sumat literally means a public announcement of something with the intention of reputation, and in legal terminology it signifies, a large dower announced with the object of self-glorification.

Large Settlements as-sumat.

The Prophet disapproved of the practice of fixing large sums as dower. The dower of the Prophet's wives and his daughter Fatima-Zohra was not more than 500 dirhems [1]. Omar-Ibn-ul-khattab the second Khalif narrates a famous tradition.

"Beware ! make not large settlements upon women because if great settlements were a cause of greatness in the world and motives of righteousness near God. Then surely it would be most proper for the Prophet of God to make them."

الترمذی وابوداؤد
عن عمرابن الخطاب قال الا لاتغالوا
صدقة النساء فانها لوكانت مكرمة
في الدنيا وتقوي عندالله لكان اولاكم
بها نبي الله صلى الله عليه وسلم -

As-sumat arises thus. Sometimes the parties settle moderate dower in private, and for purposes of " glorification " and dignity of the marriage declare a larger amount in public. The Hanafi doctrine is that when a contract is made in private, and the parties are agreed as to exact sum, or witnesses are produced to prove that the public declaration was *as-sumat*, for reputation, then the private arrangement will be deemed lawful. According to the Tahtavi if no evidence is being produced to prove *as-sumat*, or there is disagreement between the parties as to the private settlement of dower, and the woman asserts that the public declaration was correct, then the dower will be that what was mentioned publicly [2].

The Sharaya-ul-Islam states the Shiah doctrine, that the " private contract of dower is to be deemed lawful" [3].

1 *According to Von Kremer a dirhem is equivalent to the French franc.*

2 *It is frequently established by custom that public declarations of large dowers are fictitious and nominal.*

3 *Ameer Ali, Mahommedan Law Vol II P. 505.*

GENERAL OBSERVATIONS.

Under the Muslim law marriage is both a religious rite and a civil contract. The proposal and acceptance may be made in the past tense and sometimes not. Marriage with knowledge between persons who are prohibited is *batil*, void, and if contracted in ignorance it is *fasid*, invalid. " It is lawful for a *Moohrim and Moohrimah* to intermarry while in the state of *Ihram*".[1] The Shafi, Maliki and the Hanbali hold that marriages are prohibited for persons in the state of *Ihram* (when one puts on the pilgrim's dress, and is within the "Sacred territory"). Under the Shiah Law a marriage during *Ihram* is lawful. [2] A dumb man can validly contract marriage by signs, clearly indicating his intention to contract marriage [3], and he can likewise lawfully repudiate by signs intelligible. [4] Dower may consist of other things than property or money, it is a consideration of *buza*. Dower is not the necessary consequence of marriage it does not becomes due only by marriage, but by cohabitation, valid retirement, or death of one of the parties. When it is not specified how much dower is prompt or deferred, the whole does not become prompt, it depends upon custom. If the prompt dower is not paid, the wife may deny herself to the husband, and according to Imam Abu Hanifa even after consummation, she retains the right to deny herself, as long as the prompt portion remains unpaid.

The husband and wife retain their independent legal status. There is no community of goods between them. The husband has no control over the wife's property. The wife acquires a legal right over her dower, and she may be given security over some specified property for the payment of the money. The wife has a right to demand the payment of her dower before the inheritance is divided among the legal heirs, and in which capacity she also has a definite share. In some cases it leads to hardships, as it is possible that a woman by acquiring her deceased husband's entire property in lieu of dower-debt may exclude her own children from the right of immediate inheritance. She is entitled to be in possession of the property, till her dower debt is satisfied. Under the Anglo-Muhammadan law she cannot give a good title to any portion of the property, inasmuch as her position is only that of a widow in possession in lieu of her dower [5]. Her heirs are entitled to demand

1 *The Fatawa-Alamgiri, Baillie's Digest P. 20.*

2 *Ameer Ali, Mahommedan Law Vol. II P. 325.*

3 ينعقد النكاح من الاخرس اذا كانت له اشارة معلومة (ردالمحتار)

4 ويقع طلاق الاخرس بالاشارة (فتاوي عالمگيري)

5 *17 All. P.19*

the dower from her husband or his heirs. In short, after realization the dower is the sole property of the (adult) wife, and she can without the consent of anybody alienate it, pledge it, and can even make a gift of it to her husband.

"Property is not the object of marriage," hence a wife cannot be made to use her dower or her own property, nor is her father obliged to provide for her; but if he presents marriage outfits then it becomes her own exclusive property. It is not necessary that the amount of dower should be proportionate to the marriage outfit, which the wife brings, and if she brings nothing, he cannot claim for the reduction of the dower. The paraphernalia which she brings is called *Jahez.*[1]

In case of dispute between the husband and wife, as to whether they are actually married, the marriage can be proved by the testimony of two male witnesses or one male and two females. The witnesses should be competent persons to give evidence. The plaintiff may put the defendant on oath, and if the oath is refused the claim is established, but if it is taken the plaintiff's suit is dismissed.

A man can acknowledge a woman, as his wife, provided she assents, and is not related within the prohibited degree, and is not already married or observing iddat[2], and conversely if a woman acknowledges a man, as her husband, and the man assents, the marriage is proved.

Maintenance.

The husband is under obligation to treat his wife with kindness, and provide her with maintenance (food, raiment and lodging), and if there are two or four lawful wives, he should treat them with strict equality. Maintenance is due to the wife even when she is in her father's residence, unless she refuses to live in her husband's house. A well to do husband is also to provide for his wife's personal attendants. No maintenance is due if the wife is too young for sexual intercourse (unless her husband desires to retain her), or when she falls ill before the consummation of marriage, and is unable to be removed to her husband's house. A wife who is imprisoned (e. g. for a debt), or who is rebellious to her husband is not entitled to maintenance. No maintenance is due in case of a void, *batil*, marriage. The amount of maintenance depends upon the respective status and wealth of the husband and wife. It may be fixed by a judicial decree,

1 *Ameer Ali says* (*Mahommedan Law Vol. II P. 508*), "*In Algeria it has been held that the father is not bound to provide his daughter's trousseau and if he should do so, he may recoup himself from the dower which she receives on marriage.*"

2 وصح (اقراره) بالزوجة بشرط خلوها عن زوج وعدته (الدر المختار)

and if the wife anticipates difficulties, she can demand a surety to guarantee it. The amount may be raised or lowered according to the change, in the position of the husband and wife.

Absent husband.

When the husband is absent, the wife for the purpose of maintenance may dispose of such goods, or gold or silver, as left by the husband. The judge may pass the order for the sale of household effects, and shall make her declare on oath that her husband has left her no maintenance. The judge may authorise her to borrow, or purchase on credit in her (absent) husband's name. The judge may direct the depositary or debtor of the husband to provide maintenance for the wife, and call upon the wife to furnish security for the amount she receives. On the husband's return, if he proves that he had paid his wife maintenance in advance, or where the wife declines to take the oath, the husband is entitled to recover the amount from his wife, and he can likewise sue the woman, if he establishes that the marriage was dissolved, and the period of *iddat* had expired, and consequently no maintenance was due from him. The husband can sue the depositary and debtor for any sum paid to the wife, if they were aware that the marriage was dissolved.

Under the Muslim law the necessary debts contracted for the maintenance of a man, his wife and children are payable before any other debts.

Guardianship in marriage.

In accordance with a famous *Hadis* that "marriage is committed to the paternal kindred," the right to contract marriage on behalf of the minor belongs to the nearest *asab*, relations; (1) the father, failing him (2) the father's father how high soever, and failing these and subject to *Khiar-ul-bulugh* (option of puberty), it falls upon the full brother then on the half brother on the father's side and so on in the order of inheritance. Failing the *asab*, relations the right devolves on the female line on (1) the mother (2) paternal grandmother, and then on others within the prohibited degrees, [1] and failing all these, it belongs to the ruling authority, or the judge authorised to contract in marriage all orphans.[2]

Baillie in enumerating the order over-looks the obvious fact that a minor girl cannot have a son. He follows the traditional order of guardianship. He says, "The nearest guardian to a woman is her son;

1 *This is according to Imam Abu Hanifa on the principle of benevolence. Imam Muhammad denies them this right. In Kaloo v. Gureebullah, 10 W. R. 12 (1868), the Calcutta High Caurt refused to cancel the marriage of a female minor contracted by her mother without the consent of her grand-father's brother who was in jail at that time*

2 ثم للسلطان ثم لقاض نص له عليه في منشوره - (الدرالمختار)

then her son's son how low soever; next her father, then her grand father......full brother, then the half-brother by the father's side then the son of the full brother: then the son of the half brother by the father's side, how low soever ; then the full uncle; then the half-uncle by the father's side, then the son of the full uncle;..............." In the end he comes to an erroneous conclusion that, "All these guardians have the power of compulsion over a female or male during minority, and over insane persons though adult."[1]

It is a settled principle of the Muslim Law, that a father and grand-father alone have the right of compelling the minor to marry whom-soever they desire, other guardians have not the power of compulsion. The Hedaya observes, "The contracting in marriage, moreover is a right of the infant, resting upon her guardian in so much that if the infant require her guardian to contract her to any person, being her equal, for whom she has a liking, he must comply."[2]

As regards insane persons Baillie's order holds good. It is the right of the son to give her lunatic mother in marriage. If a lunatic woman has a father and a son alive, the authority rests with the son according to Imam Abu Hanifa and Yusuf; but Imam Muhammad considers that the father is the fit person.

Insane persons.

If for some proper reason the right guardian is unable to act, then the guardian next in degree is permitted to contract the minor in marriage. If the proper guardian is at a distance, or "he is removed to a city out of the track of caravans, or which is not visited by the caravan more than once a year," then the right devolves on the next guardian.

If the proper guardian has refused the proposal of marriage, then the next guardian in degree has no right to contract the minor in marriage, and in case of two relations of the same degree either of them can law-fully contract the minor in marriage:

The Kazi on duty is prohibited from marrying the minor to himself or to his own ascendants and descendants.[3] The executor under a will has also no right to contract the ward in marriage to any person, unless he acquires this right by relationship, or is authorised by the Kazi and provided no rightful guardian is alive.

If the father has become an apostate in consequence he loses his right of guardianship in marriage of his daughter, in fact he has no connection

1 *Digest P. 46.*

2 *Hamilton's Hedaya (Grady) P. 699.*

3 ليس للقاضي تزويج الصغيرة من نفسه... واصوله وفروعه (ردالمحتار)

left with his original family [1]. All his acts with regard to his property and his children are null and void.

Under the Muslim law it is allowable for adult persons of sound mind to contract marriage by means of agents. [2] Marriage is frequently effected by an agent on both sides, and owing to *pardah* and social restrictions it is invariably contracted by the agent on the part of the woman, and it is rarely effected by a declaration and acceptance made by the man and woman *per verba de præsenti.*

Agency in marriage.

The agent may be appointed verbally or in writing, and no witness is necessary for its validity, however the former is the customary practice, and one witness is usually present to avoid disputes on the part of the principal. [3]

The authority of an agent may be a general power to select a husband or a wife, but usually it is special for the purpose of contracting with a particular person a marriage, which has been already decided by the parties to the intended matrimonial contract.

In case of a general power it is unlawful for the agent to contract his principal to himself, or to any one under his sole authority. Thus if an agent marries his principal, (*a*) to his minor daughter, (*b*) to his grown up daughter, (*c*) to his grown up sister. Then in case (*a*) marriage is unlawful, and in case (*b*) according to Imam Abu Hanifa the marriage is unlawful, unless assented to by the husband, but according to the Sahibain it would be lawful, and in case (*c*) all are agreed that the marriage is lawful.

Similarly the agent cannot contract a woman to her own father or son, and likewise he cannot contract her in marriage to one who is not her equal. Such a marriage may be annulled by the Kazi on proper investigation. However the agent is not bound to make her over to the husband, nor is he bound to pay her dower, unless he has guaranteed it. [4] The agent is not permitted to delegate his authority to another person, unless the power conferred was wide enough to include the right

1 *Sir Roland Wilson thinks (Anglo-Muhammadan Law P. 173) that under the Anglo-Muhammadan Law this question is an open one (Act XXI of 1850); but see Mahin Bebi 13 B. L. R. 160 (1874) which is in conformity with the principles of Shara.*

2 و يصح التو كيل بالنكاح (فتاوي عالمگيرى)

3 لاتشرط الشهادة علي الوكالة بالنكاح......بل يشهد على الوكالة اذا خيف جحد الموكل اياها (ردالمحتار) -

4 فلا مطالبة عليه في النكاح بمهرو تسليم للزوجة (ردالمحتار)

of delegation. When two agents are appointed to contract marriage, it is not lawful for one of them to effect the contract of marriage.

If a *fuzuli* or a person wholly unauthorised, enters into a contract on behalf of one of the parties, and contract is effected, then it is dependent upon the ratification of the principal. The ratification may be express or implied. But if the marriage contracted by a *fuzuli* was void *ab initio* by reason of some lawful reasons, then no subsequent ratification by the principal can render it void, although the original cause of nullity was removed thereafter. e. g. A *fuzuli* contracts a man whose four wives are alive to a woman. That man cannot ratify the contract even after the death or divorce of one of his wives, though if he desires he can enter into a fresh contract with that particular woman.

Baillie gives an interesting example, " A *fuzoolee* marries a man to ten women by separate contracts, and on the intelligence reaching them they all approve, the marriages of the ninth and tenth are lawful......
......and if thirteen the marriage of the last only would be lawful [1]". The reason is that the marriage of one above the legitimate number (i. e. four) is a cancellation of the four preceding, hence the marriage of the thirteenth is a cancellation of all the preceding ones. A *fuzuli* has no power to cancel a marriage already contracted by himself on behalf of the principal. One person can act in marriage as agent for both parties, or as guardian for both, but one person cannot act as a *fuzuli* on both sides, or as guardian on one side and as a *fuzuli* on the other.

An agent is discharged when it is not possible for him to carry out the transaction. A appoints B to contract marriage on his behalf with C. In the meanwhile A marries C. The agent B is divested of his office whether he is informed or not. Also if A married C's mother or daughter, the agent, is discharged immediately.

1 *Baillie's Digest P. 86.*

TALAK—DIVORCE.

Talak in its literal sense is "the taking off any tie or restraint", and in law it signifies a dissolution of a marriage contract. It may be effected either by act of the husband, or wife, or by mutual agreement, or by operation of law.

The Muslim Law concedes the right of repudiation; but prohibits the exercise of this arbitrary power by threats of divine displeasure.[1]

The Prophet commanded:

"The thing which is lawful; but disliked by God is divorce."

ابوداؤد

وعن ابن عمر ان النبي صلي الله عليه وسلم قال ابغض الحلال الي الله الطلاق -

The Holy Koran not only discourages divorce; but suggests procedure for the reconciliation of the married parties under divine blessings.

Part. V. Ch. IV.

"If you fear enmity between the husband and wife, then appoint a referee from his people and a referee from her people. If they both desire a reconciliation, Allah will effect harmony between them. Surely Allah is knowing and aware."

وان خفتم شقاق بينهما فا بعثوا حكما من اهله و حكما من اهلها ان يريدا اصلاحاً يوفق الله بينهما ان الله كان عليماً خبيرا -

Divorce is the privilege of the husband, and he may pronounce it at his pleasure.[2] It may be effected by express words (*sureeh*), or by allusive words (*kinayah*). All separations[3] effected for causes directly originating in the husband are termed as *talak* طلاق, and separations proceeding otherwise by a decree of court are known as *furkut* (فرقة). If the decree is for causes imputable to the husband it has the effect of a *talak*, and if it is for causes imputable to the wife, it has the effect of annulment of marriage *faskh* فسخ e. g. the exercise of the option of puberty by the wife.

1 *Baillie's Digest P. 205 "It was originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils."*

2 *Ameer Ali, Mahomedan Law Vol II P. 511. The Mutazala sect asserts that in no case divorce is lawfull without the sanction of the Court, Hakim-ush-Shara.*

3 *Baillie's Digest P. 203. "There are thirteen different kinds of* firkut, *or separation of married parties, of which seven require a judicial decree, and six do not. The former are separarations for* jub *and impotence, and separations under the option of puberty, or for inequality, or insufficient dower, or a husband's refusal of* Islam, *or by reason of* Lian, *or imprecation. The latter are separations under the option of emancipation, or for* eila, *apostasy, or difference of* dar, *or by reason of property, (that is, one of the parties being the owner of the other), or a marriage being invalid."*

A *mubarat* divorce takes place by mutual agreement, and *khula* divorce takes place at the instance of the wife for valuable consideration to release herself.

The jurists have classified divorce under two subdivisions.

1. *Rajai* (رجعی) which is revocable, till the expiration of the period of *iddat*.
2. *Bain* (بائن) which is irrevocable, and dissolves the marriage instantly on its utterance.

Another popular classification is as follows :—

1. Talak-us-Sunnat.

   (*a*) *Ahsan* احسن (best). (*b*) *Hasan* حسن (good).

2. Talak-ul-biddat (sinful).

Ahsan.

The most approved form of divorce is *ahsan*, which is in accordance with the *sunnat*, and the Holy Koran has laid down the procedure.

Part. XXVIII. Ch. LXV.

"O Prophet ! When Ye divorce women, divorce them for their *iddat*, and calculate the days fixed and be careful of your duty to Allah."

یایها النبی اذا طلقتم النساء فطلقو هن لعد تهن واحصوا العدة واتقوا الله ربکم -

The jurists observe that *talak ahsan* takes place, when the husband pronounces divorce once during the wife's *tohur*, period of purity without having cohabited during that *tohur*, and thereafter abstains from the exercise of conjugal rights till the expiration of *iddat*. The divorce remains revocable during the *iddat*, and the parties retain the right of inheritance, and after the divorce is complete, there being only one pronouncement of divorce, the parties can re-marry.

Hasan.

Talak hasan takes place according to *sunnat* when the husband pronounces divorce three times during three successive *tohurs*. Thus the second mode is practically " a divorce upon a divorce ", and technically the first repudiation is nominally revoked and so is the second by the third repudiation which when declared becomes final, and makes the *talak* irrevocable.

Where the wife is not subject to courses the interval of 30 days is required between each successive repudiation. The marriage is dissolved after the third repudiation.

Here the husband pays no regard to *tohur*, or has intercourse since the last menstruation, and pronounces divorce in contravention to *sunnat*. The *Sunni* law regards, such a divorce lawful, but disapproves of its practice. The marriage is dissolved immediately and the divorce becomes irrevocable.

Bain.

The Hedaya says:

" Talak-i-bain (three pronouncements of divorce) may be made at one and the same time, or during the same *tohur*."

هدایه

ان یطلقها ثلثا بکلمة واحدة....

اوثلثا في طهر واحد.

"If Talak-i-bain is pronounced, it is final; but the husband is a sinner before God."

فاذا فعل ذلک یقع الطلاق وکان عاصیا.

When the marriage has not been consummated, it is enough to make one repudiation, [1] and in all cases divorce is complete and irreversible..

Before Consummation.

The Holy Koran says:

Part. II. Ch. II.

"It is no sin if you divorce women whom you have not touched, or for whom you have not settled any dower."

لاجناح علیکم ان طلقتم النساء مالم تمسوهن اوتفرضوا لهن فریضة و متعوهن -

"And if you divorce them before you have touched them, and you have fixed for them dower. Then pay half of what you fixed."

وان طلقتموهن من قبل ان تمسوهن وقد فرضتم لهن فریضة فنصف ما فرضتم.

When the marriage is contracted and no dower is fixed, and before the consummation of marriage, the husband repudiates his wife, then the husband is liable to give ***mota*** which consists of articles of clothing.

The Kunz-udda kaik says:

"If divorce has been given before cohabitation then *mota* should be given which consists of *dira* (shirt), *khimar* (head-dress) and *mulhifah* (outer garment)"

کنزالدقایق

ان طلقها قبل الوطي وهي درع وخمار و ملحفة -

1. A man says to his wife "Thou art repudiated, and repudiated and repudiated." She is divorced three times if the marriage was consummated, and once only if not consummated. The first pronouncement takes effect as a valid divorce and the next two are nugatory.

WHO MAY DIVORCE?

The divorce is effected usually at the instance of the husband, and always with his consent, as in the case of *mubarat* and *khula* forms of repudiations. Every adult person of sound mind can lawfully repudiate, but a man afflicted with madness [1] or imbecility, or devoid of reasoning faculties cannot validly pronounce a divorce, and a dumb man can repudiate by intelligible signs [2].

The Durrul-Mukhtar says: "The subject of divorce is a married woman, and the person competent to divorce is her husband who is of sound mind of age and who is awake. [3]"

در المختار
ومحله المنكوحة واهله زوج عاقل بالغ مستيقظ ۔

A youth who has not attained puberty cannot pronounce divorce.

The Prophet declared: "Every Talak is lawful except that of a minor [4] or a lunatic."

هدايه
كل طلاق جائز الا طلاق الصبي و المجنون ۔

Sir Roland Wilson suggests [5], that the above tradition has been relied by the jurists to maintain that a divorce pronounced under compulsion, or in the state of voluntary intoxication is valid.

Compulsion.

However a contrary *Hadis* is found in "Abu Daud" reported by Aayesha.

ابوداود

"The Prophet said, there is no divorce and no emancipation by compulsion."

وعن عائشة قالت سمعت رسول الله صلى الله عليه وسلم يقول لا طلاق ولا عتاق في اغلاق ۔

The eminent Muslim jurists are equally divided on this point. While Imam Shafi' Malik, and Hanbal consider divorce under compulsion as invalid, the Hanafi jurists consider it as binding on the plea that the person pronounced divorce under circumstances of complete competency (maturity of age, and sanity of intellect). Imam Shafi' retorts that divorce is not effective, inasmuch as a person who is compelled has no option.

The Fatawa Alamgiri refers to a divorce given under compulsion by the order of the Sultan as valid. Ameer Ali boldly suggests that a Hanafi,

1 لا يقع طلاق المجنون (البحر الرائق)
2 ويقع طلاق الاخرس بالاشارة (فتاوى عالمگيري)

3. *One talking in his sleep can not divorce.*
4. *The jurists also hold that the father cannot validly repudiate the wife of his minor son.*
5. *Anglo-Muhammadan Law P. 138 and followed in 12 W. R. 460 (1869)*

who has divorced his wife under coercion should become a Shafi' and thus invalidate the divorce.

The Hanafi jurists made distinction between voluntary and involuntary drunkenness. When a husband becomes intoxicated of his own free will, and repudiates his wife the divorce is valid; but if he were intoxicated under compulsion or from necessity, the repudiation which he pronounced has no effect.

Intoxication.

Some jurists including Imam Shafi' and Karkhi treat the pronouncement of divorce by an intoxicated man in every case as ineffective on the ground, that the wine might have produced delirium or inflammation of the brain to such an extent, as to make him devoid of reasoning faculties. The Hanafi retort that the suspension of reason was produced by drinking wine which is prohibited, and hence the *talak* is by way of punishment to deter one from drinking wine. The correct principle appears to be that if the man is not liable to punishment for drunkenness, a *talak* pronounced by him is not valid. That is, if a man takes something lawful e. g., extract of honey, or anything that does not agree with him, or takes anything unlawful under compulsion or necessity and becomes inebriated, and loses his consciousness, and in that condition pronounces a *talak* it will not be effective.

The Hedaya says that a divorce pronounced in jest is valid inasmuch as the person was not in fear, but it is equally true that he was neither desirous nor intended to repudiate his wife.

Jest.

This view which is peculiar to the Hanafi may directly be traced to a tradition styled by Tirmizi as a weak *Hadis*.

It is reported by Abu-hurairah that the Prophet said, "there are three things which whether done in joke or in earnest shall be considered as serious and effectual. (1) marriage, (2) divorce (3) *Rajat* taking back."

الترمذي
وعن ابي هريرة ان رسول الله
صلى الله عليه وسلم قال ثالث جدهن
جدو هزلهن جدالنكاح والطلاق والرجعة
قال الترمذي هذا حديث حسن غريب.

According to the Sunni law no special form of pronouncement is necessary for effecting a *talak*. Mr. Abdur Rahman's observation, that in order to render a repudiation valid the use of special words is necessary should be cautiously understood. [1] The Hanafi law insists that the words of divorce should show a clear intention to dissolve the contract of marriage. Divorce does not depend upon special words, the Fatawa Alamgiri and Kazi Khan mention an infinite number of formulae which are considered sufficient to effect a complete separation [2].

1. *Institutes of Mussalman Law P. 129.*

2. *Such expressions, "I am forbidden to thee"; "I have released thee from being my wife",*

However the Shiah law recognises only two formulae as effectuating a valid repudiation, and the presence of two witnesses is essential. The use of any other formulae whether explicit or ambiguous is of no effect in causing separation.[1] The Shiah jurists do not even allow a *talak* to be given in writing nor in any other language than the Arabic [2]; but after the husband has pronounced the words in the presence of witnesses, it may be recorded in writing and intimated to his wife. Under the Hanafi law divorce may be effected orally or in writing [3], and in fact this is the usual form in civilised communities.

Talak option.

It is a well known rule that " A repudiation cannot be qualified by option". If a man says to his wife, "I have divorced you, but I reserve to myself an *option* for ten days." Here the repudiation is valid, but the option is invalid.

Izafat.

If a repudiation is pronounced conditionally, and that the condition is such as is not impossible of fulfilment then the condition is valid, and the divorce takes effect on the happening of the condition [4]. The effect of repudiation may be postponed from the time of speaking to some future time without any condition. When a man says "You are repudiated tomorrow." Then the repudiation takes place at the dawn of tomorrow" [5]. If a person says, "you are repudiated to-morrow," or " after tomorrow," repudiation takes effect after to-morrow, according to the principle when divorce is referred to one of two times it takes effect from the last of them.

A repudiation may be combined with a condition and made contingent on its occurrence. If a man says to his wife, "You are divorced before your entry into this house in a month," and she should enter no divorce takes place, but if she enters at the termination of a month from the date of speaking she would be divorced. When repudiation is made dependent on the happening of two facts, then it takes effect on the happening of the last of them and not merely on the first.

Comparing.[6]

If a person says, (a) " thou art repudiated like the magnitude of the point of a needle", or (b) "like the point of a needle ". Then in case (a) according to Imam Abu Hanifa and Abu Yusuf the revocation is irrevocable, and in case (b) it is irrevocable according to Imam Abu Hanifa, but revocable according to Abu Yusuf.

1. *Ameer Ali Mahommedan Law Vol II P. 524-5.* 2. *Ibid P. 523.*
3. *No divorce takes plase if the writing is not manifest e. g. written on water*
4. *The Shiah regard all Talaks with an option or condition as void.*
5. *Some extend it to the end of the morrow.*
6. *For various examples see Baillie's Digest P. 223.*

KHULA DIVORCE.

Khula in its literal sense means "to draw off or dig up," and in law it signifies an agreement between the husband and wife, with a view to dissolve the contract of marriage in lieu of compensation paid by the wife to her husband. When a divorce is effected by mutual consent it is called *mubarat* The Holy Koran expressly sanctioned *khula* form of repudiation.

Khula.

Part. II. Ch. II.

"It is not lawful for you to take from them anything of what you have given them, unless both fear that they cannot keep within the limits prescribed by Allah. So if you fear, that you cannot keep within those limits, there is no blame on you both for what she ransoms herself with."

ولا یحل لکم ان تاخذوا مما ایتمو
هن شیئا الاان یخافا یقیما حدوداللہ
فان خفتم ان لایقیما حدوداللہ فلا
جناح علیہما فیما افتدت بہ ۔

Hence whenever enmity exists between the husband and wife, and they apprehend that the matrimonial alliance is not likely to serve the ends of marriage, then it is perfectly lawful for the women to seek *khula*, separation, and all things that are capable of being settled as dower can be accepted, as compensation for *khula*[1]. When a husband proposes a *khula* repudiation in consideration of compensation to be paid by the wife, then it absolutely depends upon the wife's voluntary consent, and such a proposal cannot be retracted at the meeting at which it is made, until the wife has declared her refusal or acceptance; but when it is the wife who makes the proposal, she can retract before her husband has signified his acceptance. If the wife fails to make good the agreed compensation, it does not invalidate the *khula* separation; but the husband is entitled to sue for any property or money due under the agreement.

The legal effect of *khula* according to the Hanafi law is the same as a single irrevocable divorce.

The Tahtavi says.

"It is settled that *khula*, repudiation with or without compensation amounts to a Talak-i-bain."

طحطاوی
وحکمہ الواقع بہ ولوبلامال....
طلاق بائن ۔

A father can obtain a *khula* repudiation of his minor daughter; but in no case can a father consent to *khula* separation on behalf of his minor son. When the husband makes an offer of *khula* to his minor wife, subject to compensation to be paid by her, then if she has attained the

1. *Abdur Rahman's Institutes of Mussalman Law P. 166.*

age of reason (7 years) and consents, the repudiation will take place; but her right to dower remains intact, and the payment of compensation is not binding on her.

Khula is lawful when given under compulsion, or in a state of voluntary intoxication. *Khula* of an insane person is void.

The effect of *khula* on dower

The jurists differ in the absence of express agreement as to the effect of *khula* on dower, and whether the respective claims of husband and wife are extinguished by *khula* separation. Imam Abu Hanifa held that rights relating to dower are extinguished by both *khula* and *mubarat*, and the Hedaya, Fatawa Alamgiri and the Durrul-Mukhtar follow him. Abu Yusuf held that *mubarat* divorce only extinguishes them, while Imam Muhammad held that they are extinguished by neither.

Baillie observes, "*khoola* and *moobarat* (mutual release) cause every right to fall or cease which either party has against the other depending on marriage "[1]. Sir Roland Wilson considers this passage and the following two passages as self contradictory. Baillie says further, " When a *khoola* is made by means of the word *khoola*, it does not occasion a release of any other debts than dower, and that in like manner with regard to the word *moobarat*, though there is a difference of opinion, the correct view is that it does not occasion a release of other debts than dower."[2] Criticising these passages, Sir Roland Wilson says, " In order to reconcile the first sentence with what follows, we must assume that dower was the only " debt " (as distinguished from non-pecuniary obligations) which the writer considered to be dependent upon the (continuance of the) marriage."[3] It may be so, but it also appears that these passages are supplementary. The first passage mentions simply that all rights depending on marriage fall or cease, that is to say there is a complete dissolution of *nikah*, and this does not mean that the rights of the wife to be paid of her debts cease, inasmuch as this right is in no way dependent on marriage, for the Law treats the husband and wife, as independent persons in their transactions. However the interesting point to determine is whether dower is a right depending on marriage or a debt independently due. The jurists differ, some consider " *Mahr* as a right depending on marriage" and not as a debt, while others treat it just like other debts. The correct view is that a dower debt should be placed in a category by itself, and it should not be considered on the same basis, as other debts. There is a consensus of opinion that debts other than dower are unaffected by *khula* and *mubarat*, for no form of divorce can affect the legal liability of the husband to pay off money due to his wife.

1. *Digest P. 306.* 2. *Ibid P. 307.* 3. *Anglo-Muhammadan Law P. 144.*

The first instance of *khula* recorded by the Muslim historians is the classical case of Sabit-bin-kais. Ibn Abbas said, "the wife of Sabit-bin-kais came to the Prophet and said, 'O Messenger of God ! I am not angry with Sabit for his temper or religion, but I am afraid something may happen to me contrary to Islam, on which account I wish to be separated from him.' The Prophet said; Will you give back to Sabit the garden which he gave you as your settlement ?' She said, 'Yes', then the Prophet said to Sabit, 'Take your garden and divorce her at once''

البخاری
عن ابن عباس ان امراة ثابت بن قيس اتت النبي صلي الله عليه وسلم فقالت يا رسول الله ثابت بن قيس مااعتب عليه في خلق ولادين ولكني اكره الكفر في الاسلام فقال رسول الله صلي الله عليه وسلم اتردين عليه حديقته قالت نعم قال رسول الله صلي الله عليه وسلم اقبل الحديقة وطلقها تطليقة .

Rajat, revocation.

The revocation of divorce is technically known as *Rajat*, and is defined as the maintaining of a marriage in its former condition, or receiving back his wife after divorce.

Rajat is of two kinds "(1) Soonnee (2) Budaie" [2], or as the Hedaya says express and implied. The former is effected in a regular way by calling on witnesses, and intimating to her directly by saying "I have retained thee." The Budaie is inferred from conduct e. g. by carnal connexion or taking conjugal liberties with her.

The Holy Koran encourages reunion of the divorced parties, and considers it meritorious to cancel divorce, with mutual consent during the continuance of *iddat*.

The Koran says. Part. II. Ch. II.

"And when ye divorce women and they have completed their *iddat*, then either retain them with humanity, or dismiss them with kindness, and retain them not with violence. So that ye transgress, for he who doth this, surely injureth his own soul."

واذا طلقتم النساء فبلغن اجلهن فا مسكو هن بمعروف اوسرحوهن بمعروف ولا تمسكو هن ضرارا لتعتدوا - من يفعل ذلک فقد ظلم نفسه

The point to be considered is whether the revocation of divorce is independent of the consent of the wife. Baillie says, "He may retain her while she is still in her *iddat* whether she be willing or not, according to the sacred text, 'Hold them with humanity'; in which there is no distinction between willingness and the absence of it"[3]. The Hedaya is of similar opinion, and this is the view of the jurists also. But a closer study of the Koranic verse clearly shows that the passage "*retain them*

1, *Mahomed Yusoof ' Mahomedan Law Vol 1 P. 128.* 2 *Baillie's Digest P. 287.*
3. *Digest P. 287.*

not with violence" implies that the consent of the wife *in iddat* is essential. However there is unanimity of opinion that the husband loses his "right of return" on the expiry of *iddat*, and it is desirable that the wife should have previous notice of her husband's intention, for otherwise it is possible that another person may marry her (though it will be an invalid marriage), and consummate that marriage.

Re-marriage.

After the divorce is complete, there is a further provision made for the remarriage of the parties by the Koran.

Part. II. Ch. II.

فان طلقها فلا تحل له من بعد حتى تنكح زوجا غيره - فان طلقها فلا جناح عليهما ان يتراجعا ان ظنا ان يقيما حدود الله -

" But if the divorce is complete, she will not be lawful to him, until she marries another husband. If he also divorces her, then there is no sin, if they return to each other (by marriage), and they believe they can keep within the limits prescribed by Allah."

The juristic conception of such an intervening marriage is well expressed in the Tahtavi.

طحطاوی

امی نکاح الزوج الثانی یهدم بالد خول........مادون الثلاث ایضا

"After the consummation of the second marriage, previous repudiations of the former husband are nullified."

Hence a new marriage, subject to a new dower, can be validly solemnized. It is unlawful to enter into nominal or fictitious marriages to fulfill the requirements of the Law. It is essential that the marriage should be consummated, and should not be with the intention of immediate divorce with a view to effect re-marriage with the former-husband.

ابن ماجه

عن عبدالله بن مسعود قال لعن رسول الله صلي الله عليه وسلم المحلل والمحلل له -

Abdullah-bin-Masud said, " The Prophet has cursed the second husband, who makes the wife lawful for her first husband, and has cursed the first husband for whom she is thus made lawful." [1]

Iddat.

Iddat is the waiting for a definite period for the divorced women it is three courses, for the widow it is four months and ten days, and for the pregnant woman it ends with delivery [2].

1. *Mahomed Yusoof's Mahomedan Law Vol. I P. 125.*

2. *Iddat for a woman not subject to courses is three months. A marriage with the divorced wife's sister, aunt or niece during the continuance of the iddat is prohibited.*

The husband may return to his wife during the *iddat* and according to the Bahr, "The husband's right to return ceases on the tenth day of her last menstrual period (i. e, 3 tohurs)."

البحرالرائق
وتنقطع الرجعة ان طهرت من الحيض الاسر التمام عشرة ايام -

The Durrul Mukhtar provides for the settlement of dispute between the husband and wife, as to the exact time of the expiration of *iddat*.

"In case of dispute as to the termination of *iddat*, the wife's word on oath shall be accepted as conclusive, provided it is reasonably justified by the length of time."

درالمختار
قالت مضت عدتي والعدة تحتمله وكذ بها الزوج قبل قولها مع حلفها -

Iddat while it lasts is an impediment to marriage. It is incumbent whether separation has taken place due to irrevocable or revocable repudiation or judicial separation effected in consequence of husband's impotency, or by reason of *Lian*, or exercise of the option of puberty, or at the annulment of a void marriage, and also after proper retirement with the husband in case of a valid marriage.

The divorced woman is not to conceal her puerperal courses.

The Koran says. Part. II. Ch. II.

"It is not lawful for them that they should conceal what Allah has created in their wombs. If they believe in Allah and the last day, their husbands have a right to return to them (at this time) if they desire reconciliation."

ولا يحل لهن ان يكتمن ما خلق الله في ارحامهن ان كن يومن بالله واليوم الاخر وبعو لتهن احق بردهن في ذلك ان ارادوا اصلاحاً -

Some jurists hold that a woman may accomplish her *iddat* without her knowledge. The *iddat* incumbent upon divorce or widowhood commences immediately on divorce, or upon the death of the husband, and if therefore a woman is not informed of divorce or widowhood, until the time fixed for *iddat* has elapsed, then she is deemed to have kept her *iddat*. The modern jurists hold that the *iddat* runs from the time divorce is publicly made known. [1]

Iddat without knowledge.

In an invalid marriage the *iddat* commences immediately on the voluntary separation of the parties, or upon the judicial decree causing separation. There is no *iddat* in a *batil* void marriage, nor for a woman repudiated before consummation; but it is incumbent after valid retirement. A wife observing the *iddat* is entitled to maintenance and the parties retain the right of inheritance to each other.

1. This is to avoid collusion and fraud e. g., the husband pretending the marriage was dissolved and the iddat had expired could lawfully make a bequest to his wife of more than her share.

JUDICIAL DIVORCE.

The contract of marriage may be dissolved by judicial decree, generally by reason of (1) impotency of the husband, (2) the option of puberty, (3) *Lian,* (4) inequality, (5) husband's refusal of Islam.

Impotency.

A wife is entitled to claim a divorce, if she was unaware of her husband's impotency prior to the *nikah,* but if she married him with knowledge that he was physically impotent, then she cannot seek separation from him. And if after consummation of marriage the husband became impotent, then the wife has no right to seek divorce. The Fatawa Alamgiri lays down the procedure.

"When the wife brings a charge of impotency against her husband and demands *tafrik,* separation, then the Kazi will investigate the claims, and if the husband admits that he has had no intercourse with her, the case is to be adjourned for a full year."

فتاوی عالمگیری
اذارفعت المرأة زوجها الى القاضي وادعت انه عنين وطلبت الفرقة فان القاضي يسئله هل وصل اليها اولم يصل فان اقرانه لم يصل اجله سنة -

However if the husband denies the charge on oath, and the wife still maintains that she is *virgo intacta* [1], the Kazi shall appoint two lady doctors to examine her, and if they declare her to be a virgin then the case is similarly adjourned for a year. According to the Zahir Rewait the adjournment is to be regulated by the lunar year. This is confirmed by the Hedaya and is an accepted view. The author of the Ghait-ul-Bayan and others consider that the period of adjournment should be the solar year, which exceeds the lunar by eleven days. If at the end of the year the wife still maintains that her husband has had no inter course with her, she is entitled to separation. The separation that takes place will be a Talak-i-bain.

There is no adjournment in the case of *majbub,* a person whose genital organ is completely mutilated, and in the case of a wife who has herself a physical obstruction to generation. The husband may exercise his ordinary power of divorce without judicial assistance. Under the Hanafi law after *Khilwat-Sahih* the wife is entitled to her full dower; if there has been no valid retirement then to a moiety of her dower. The Shafi' give her half the dower only.

1. Ameer Ali Mahommedan Law, Vol. II, P. 577. "If she was not a virgin at the time of marriage, and the husband swears that he has had connubial intercourse with her, she has no right to a divorce."

The Muslim Law recognises two kinds of options in marriage (a) the option of emancipation, *Khyar-ul-itk* (b) the option of puberty, *Khyar-ul-bulugh*. *Khyar-ul-itk* is the option given to a female slave on emancipation to abide by the marriage, or separate herself from her husband whether he be free or a slave. It is available only to female and not to male slaves, and it does not require the decree of court for the dissolution of marriage. A female slave who has married without her master's permission has no option of emancipation left subsisting to avail herself on manumission.

Option.

The doctrine of *Khyar-ul-bulugh* (option of puberty) is the right vested in a minor to ratify or rescind on attaining puberty the marriage contracted on his or her behalf during minority. The exercise of the option does not *ipso facto* dissolve the marriage, but it requires a decree of dissolution to be passed by the Kazi. The option must be exercised by a female on the appearance of the signs of puberty (on first seeing her monthly courses), and according to the Hedaya on the announcement of the fact of her marriage, she must repudiate, otherwise she loses her right.[1] A male retains his option until an expressed declaration or by conduct by payment of dower or by co-habitation. In the case of a *saiba* (e. g., not a virgin widow or divorcee) the ratification must also be explicit. The Fatawa Kazi Khan says for a *saiba* option is not rendered void except by express words, or by co-habiting with the husband, or by asking for dower or maintenance.

If a minor's marriage was contracted by the father or grandfather then the Hanafi view is that the marriage could not be cancelled, the minor has no right of the option of puberty; but when contracted by any other person he or she may according to Abu Hanifa and Muhammad on arriving at puberty, cancel it or abide by it.

No option.

The Hedaya says :

"If the fathers or grandfathers married the minors whether male or female then they have no option of puberty on attaining majority, because the parents are wise and affectionate, and no sinister motives could be attributed to them. The *nikah* is binding on the same footing, as it would be, if the parties had themselves entered into it after maturity."

According to the Raddul-Muhtar and also the Shiah doctrines if the father or grandfather "wickedly" contracted a marriage, e. g., to a lunatic

1. According to the Hanafi law the females may attain puberty at 9 and the males at 12. It is presumed for either sex at 15.

or an eunuch then the minor retains the option of puberty. The Shiah hold that a marriage contracted by a guardian (*fazuli*) except a father or grandfather is of no legal effect, it remains in suspension, until ratified and assented to by the minors on attaining puberty, and if one of the parties were to die before such ratification, the contract ends, and there would be no right of inheritance to the survivor, but under the Hanafi law the survivor inherits.

Ameer Ali raises two interesting questions: (a) "What is the reason for requiring the Kazi's decree in such cases?"; (b) "What would be the effect if the woman were to remarry without obtaining a judicial declaration?" Further he says, "To my mind it means simply this—that in order to cause an effective cancellation or to impress on the act the judicial *imprimatur*, an order of the Kazi is necessary............."But it does not follow from this that if a woman who has exercised option were to contract another marriage believing that she was entitled to do so, she would make herself liable to punishment under the criminal law. The validity of the rescission, it seems to me, does not depend on the *imprimatur* of the Kazi, as the judicial declaration is needed to provide judicial evidence in order to prevent disputes, and judicial confirmation and authentication of the exercise of the right." [1]

This view however is incorrect because the exercise of the option of puberty does not *ipso facto* dissolve the contract of marriage. The marriage subsists in entirety till it is cancelled by the Kazi. The judicial decree is not merely a confirmation of the exercise of the right, it is a decree of nullity "annulatio matrimonii", and essential to break up the rights and duties of the previous marriage. Hence if a girl immediately after exercising her option without waiting for the decree of the court marries another, she would be rightfully convicted of bigamy[2]. The tie of marriage is sacred, it requires certainty for its continuance and for its dissolution. It cannot be annulled in an uncertain doubtful manner. The Hedaya clearly says, that "in dissolving the marriage decree of the Kazee is a necessary condition in all cases of option exerted after maturity[3]."

1. *Mahommedan Law, Vol, II. P. 415.*

2. *This view is contrary to Ameer Ali's opinion. He says (Mahommedan Law, Vol II. P. 416.) "The Indian Law Courts have often convicted of bigamy girls who in their infancy had been contracted in marriage by their guardians, but who on attaining their majority had married other men." Also see Badal Aurat V. Q. E., 19 Cal., 79 (1891).*

3. *Hamilton's Hedaya (Grady) P. 37.*

Baillie observes, " And if a boy or girl should choose to be separated, after arriving at puberty, but the judge has not yet made the separation when one of them dies, they have reciprocal rights of inheritance, and up to the actual separation between them by the judge the husband may lawfully have intercourse with his wife." [1] The latter portion at first sight may seem to mean that the husband may enforce his marital rights in conformity with the principles of the Muslim law, against the wishes of his wife, but it follows from the fact that the wife is about to elect to separate herself that her consent is essential, as connubial intercourse will invalidate the exercise of the option of puberty. As the marriage is subsisting the parties retain mutual right of inheritance in the capacity of husband and wife. The effect of separation is that the woman has no title to dower, but if the marriage was *consummated* the wife is entitled to full dower. [2]

Lian.

When the husband makes a statement accusing his wife of adultery the procedure for the settlement of this accusation, by swearing and imprecating upon them the curse of God, is known as *Lian.*

The Holy Koran says:

Part XVIII. Ch. XXIV.

"Those who accuse their wives, but have no witnesses except their own-selves, then their evidence is to witness God four times that they are truthful, and the fifth time that the curse of God be upon them if they be liars."

والذين يرمون ازواجهم و لم يكن لهم شهداء الا انفسهم فشهادة احدهم اربع شهادات بالله - انه لمن الصادقين والخامسة ان لعنة الله عليه ان كان من الكاذبين -

The Koran gives the wife also a chance to rebut her husband's oath.

Part XVIII. Ch. XXIV.

"But it will avert the punishment from her, if she will testify by God four times that he is a liar. And the fifth time that the wrath of God be upon her, if he be truthful."

ويدرؤ عنها العذاب ان تشهد اربع شهادات بالله انه لمن الكاذبين والخامسة ان غضب الله عليها ان كان من الصادقين -

It is reported in Al-Bukhari by Ibn Abbas that the occasion of the revelation of the above verses was at the trial of Hilal bin Umayah. Hilal had accused his wife of adultery with Shink-bin Salima the Holy Prophet in accordance with the previous verse of the Koran demanded

1. *Digest, P. 51.*

2. *This is not possible under the Anglo-Mahommedan Law in India, but under the Muslim law the consummation of marriage is possible at the age of 8 or 9 before the girl has actually reached the age of puberty.*

him to produce four witnesses, or receive the prescribed punishment of eighty stripes.[1]

The Koran says: Part. XVIII. Ch. XXIV

"Those who accuse chaste women, and do not bring four witnesses scourage them with eighty stripes, and do not receive their testimony for ever for they are surely sinners."

والذين يرمون المحصنات ثم لم
يأتوا بأربعة شهداء فاجلدوهم ثمانين
جلدة ولا تقبلوا لهم شهادة ابدا
واولئك هم الفاسقون ـ

Hilal exclaimed, " I swear by God, I am truthful. God will send down an order, and save me from being flogged." Then the above verses constituting *Lian* were immediately revealed.

"*Lian*", says Baillie, "are testimonies confirmed by oaths on both sides, referring to a curse on the part of the man, which is a substitute for the *hudd-ool-kuzf*, or specific punishment for scandal, and for *ghuzub* or wrath on the part of the woman, which is a substitute for the *hudd-ooz-zina* or specific punishment for adultery." [2]

Lian does not admit of agency, nor forgiveness, release or composition, and it is to be taken between the spouses once only. The persons who can take *lian* are those who are competent to be witnesses. Hence if one of the spouses has undergone punishment for scandal, or is otherwise an incompetent, e.g., an infidel, a mad man or a dumb person, then the procedure of *lian* is not admissible. The legal effect of *lian* is to make connubial intercourse unlawful, but if the husband retracts his accusation, intercourse would again become lawful. When both parties have reciprocally taken *lian*, immediate divorce does not take place, though Zafar held that separation takes place independent of judicial decree. The correct view is that no separation takes place, till the decree is passed by the Kazi directing the husband, to divorce his wife, and if he refuses the Kazi may dissolve the marriage.

The parties retain mutual right of inheritance, and all the rights and duties, as the marriage subsists till it is dissolved by the Kazi.

Under the Shiah Law the parties thus separated cannot remarry, and the Shafi' and the Maliki agree with them. But under the Hanafi law the parties may remarry on the transpiry of any fact which would have prevented the adoption of *lian*, e.g., if the husband should acknowledge that his accusation was false. This is according to Imam Abu Hanifa and Muhammad but not Abu Yusuf.

1. *Inasmuch as there is no punishment for conjugal infidelity in India, the law of Lian may be considered to be obsolete. The Egyptian Code of Hanafi Law recognises Lian, Art. 334—339.*

2 *Baillie's Digest, P. 335.*

Lian may be incurred by imputing adultery and denying the child. In this case on judicial separation the child is to be affiliated to the mother by express declaration of the Kazi, otherwise the paternity of the child would not be negatived.

The procedure of *lian* is applicable only in the case of a Muslim and a Muslemah.

It is stated in the Majah.

Amer-Ibn Shuaib relates that the Prophet declared, "there are four kinds of women, between whom and their husbands *lian* cannot be made; a Christian woman, a Jewish woman married to a Muslim and a free woman to a slave and a slave girl to a free man."

ابن ماجة

عن عمرو بن شعيب النبي صلى الله عليه وسلم قال اربع من النساء لا ملاعنة بينهن النصرانية تحت المسلم واليهودية تحت المسلم والحرة تحت المملوك والمملوكة تحت الحر -

That is all husbands should be the equals of their wives, but the converse is not necessary, if a woman marries a man 'better' than herself, her guardian have no power to separate her. There are six qualities of *kufuship.*[1] (1) Islam, (2) Lineage, (3) Freedom, (4) Equality of wealth, (5) Piety and virtue, (6) Equality in trade or business.

Inequality, kufuship.

If unequal marriages are contracted they remained valid, till cancelled by the Kazi.

Where the man deceived the woman as to his condition in life the woman may cancel the marriage.

Fraud.

The Tahtavi says:

"If in a marriage the man deceives the woman, and gives himself a false table, or misrepresents his condition in life, and the woman discovers the fact after the *nikah*, then both she and her guardian may cancel or ratify the marriage."

طحطاوی

لو انتسب الزوج لها نسبا غير نسبه فان ظهر دونه وهو ليس بكفؤ فحق الفسخ ثابت للكل . . . . يقال ان هذا الخيار ترتب على الغرر -

It is a rule of the Muslim law that if a married woman whether she is an infidel or a follower of a scriptural or a revealed religion has accepted Islam as her faith, then the Kazi is to offer Islam to her husband, and if he refuses, the parties are to be separated immediately. Such cases were very frequent in the

Husband's refusal.

1. *Ante P. XXVIII. The doctrine of kufuship is greatly disputed by the jurists on the ground hat all Muslims are equal in all respects, and free to contract marriage.*

time of the Holy Prophet. Actual incidents are reported in the Shireh Sunnat of a daughter of Walid-bin Mughirah who had married Safwan-bin-Amiah, and of Omm Hakim wife of Acrimah. In both these cases the wife had embraced Islam first. The Holy Prophet allowed time for their husbands to accept Islam, and on their conversion, he declared that the marriage tie remained valid. A Hadis is reported by Ibn-Abbas illustrating an extreme case.

"A woman embraced Islam and married a man. Her first husband came to the Prophet and said 'Apostle of God I have embraced Islam,' then the Prophet caused the second marriage to be cancelled, and returned her to her first husband."

مالک
وعن ابن عباس قال اسلمت امرأة
فتزوجت فجاء زوجها الى النبي
صلى الله عليه وسلم فقال يا رسول الله
اني قد اسلمت وعلمت باسلامي فانتز
عها رسول الله صلى الله عليه وسلم من
زوجها الاخر وردها الى زوجها الاول -

Where both the husband and wife embrace Islam together, the marriage remains valid, unless it was contracted within the prohibited degrees, and if so the Kazi will separate the parties.

Apostacy.

The majority of jurists hold that when either the husband or the wife apostatises from Islam, then the marriage is dissolved, and separation must take place. The Fatawa Kazi Khan says, that this rule applies to a boy who is capable of understanding.

"When a boy is capable of understanding, his apostacy cannot be disregarded, it causes separation according to Abu Hanifa and Muhammad."

فتاوى قاضي خان
الصبي الذي يعقل ارتداده يصح
ويوجب الفرقة في قول ابي حنيفة
ومحمد رحمهما الله تعالى - وكذا رتداد
الصبية التي تعقل -

So also in the case of apostacy of a girl capable of understanding.

"When both the husband and wife become apostate simultaneously, then separation is not effected between them by 'liberal construction' so that if they again become Muslims the marriage tie subsists between them."

فتاوى قاضي خان
زوجان مسلمان ارتدا معا لم يقع
الفرقة بينهما استحسانا حتى لو
اسلما كان النكاح قائما بينهما -

If apostacy has taken place after consummation, then the wife is entitled to her dower, but if consummation has not taken place, and it is the husband who apostatises, then he shall pay her half the dower, and if the wife apostatises then no dower is due to her. The period of *iddat* is incumbent upon the wife, and during the continuance of *iddat* the parties retain inter se the right of inheritance.

Ameer Ali says, "It is now generally recognised that when the husband renounces Islam and the wife continues in the Faith, the connection becomes unlawful, but if the man were to return to Islam before the expiration of the wife's *iddat* (the probation she has to observe as if he were dead), there would be no need for a re-marriage between the parties." He cites the Raddul Muhtar, " If an apostate removes to the Dar-ul-Harb (an alien country where the laws of Islam are not in force), and there divorces his wife it will not be effective." He adds, " His removal to an alien country makes no difference in the principle, for this removal is merely with the object of escaping the penalty of death." [1] The inference drawn by the learned author is incorrect, as the fact of divorce being pronounced in the Dar-ul-Harb makes all the difference. The Muslim law maintains clear distinction between the Dar-ul-Islam and Dar-ul-Harb. An act in the Dar-ul-Harb may be devoid of legal consequences while the same act in the Dar-ul-Islam may by subject to legal restrictions. In the example above the divorce is not effective because in the juristic sense the effect of the husband being in the Dar-ul-Harb is for all purposes of law to render his acts null and void [2].

It is clear from the Fatawa Kazi Khan.

فتاوى قاضي خان

ولو طلقها بعد اللحاق بدار الحرب لايقع الطلاق - فان عاد الى دارالاسلام مسلما وهي في العدة وطلقها بعد ما خرج من دارالحرب لايقع الطلاق في قول ابى يوسف رح الاخر - ويقع فى قوله الاول وهوقول محمد رح -

"If the husband divorces his wife after he has joined to the Dar-ool-Hurub, the divorce shall not be caused (because by his becoming an apostate, the marriage has become dissolved), and if he again returns to the Dar-ool-Islam as a Moslem, whilst the woman is in her *iddat* (on account of the apostacy of the man), and divorces her after getting out of the Dar-ool-Harub, the divorce shall not be caused according to the second view taken by Aboo Yusoof, on whom be peace (because the *nikah* has become cancelled); but according to his first view, the divorce shall be caused, and this is also the view of Mahomed on whom be peace (because the woman is observing *iddat.*)"[3]

Ameer Ali adopts the view of Imam Muhammad, and comes to the conclusion that " the marriage does not become dissolved instantly the man abandons Islam, for otherwise a divorce given by him after his return to the Faith would not be effective." [4] However the accepted

1. *Mahommedan Law, Vol. II. P. 431.*

2. *Mahomed Yusuf (Mahommedan Law, Vol. II. P. 72) says " by becoming a Moortud (apostate) he forfeits his life and property and the Kazi shall decree that he must be treated as dead and a divorce by dead is not effectual."*

3. *Mahomed Yusuf's Mahommedan Law, Vol. III. P. 346.*

4. *Mahommedan Law, Vol. II. P. 432.*

view is the second opinion of Imam Abu Yusuf that is the marriage is dissolved on apostacy of the husband and the *iddat* is obligatory.

Ameer Ali cites the orthodox view of the jurists of Bokhara and those of Balkh and Samarkand. He recommends the latter, and says, "when a woman abjures Islam for a Scriptural or revealed religion like Judaism or Christianity *her renunciation of the Faith does not dissolve the marriage.*"[1] As this specific case has not been discussed by the jurists, Syed Ameer Ali's opinion deserves consideration, and it appears to me to be an equitable view, provided the parties desire to maintain the marriage tie. At any rate under the Muslim law they could lawfully contract a subsequent marriage.

The following passage from the Fatawa Kazi Khan also favours this view, and the distinction between an infidel and a *kitabia,* is clearly maintained. Hence a wife's conversion to heathenism should be treated differently from that of Christianity.

"If the husband becomes a Muslim, but his wife remains an infidel (Hurubee or Majoosee), then Islam shall be offered to the woman if she refuses, then separation shall be caused between them, this separation is not equivalent to divorce. But if the woman is a *kitabia* then the marriage shall continue between them in its original state."

فتاوى قاضي خان
وان اسلم الزوج وامراته حربية
اومجوسية يعرض الاسلام عليها - فان
اسلمت - والافرق بينهما ولايكون طلاقا -
وان كانت كتابية يبقى النكاح بينهما
على حاله -

However in the converse case where the husband has apostatised, there is no doubt that separation will take effect, because while a Muslim is permitted to marry a *kitabia* a Muslimah is prohibited from marrying an *ahl-kitab*.

The Fatawa Kazi Khan deals with the case of two Christians where it is not the husband but the wife who becomes a Muslim, with the result, that if the husband refuses Islam the marriage is dissolved. It has already been noted that on the husband's conversion to Islam the marriage remained lawful.

"A Christian boy is married by his father to a Christian woman, the woman becomes a Muslim; the Kazi shall not effect a separation between them, until the boy is of age to under-

فتاوى قاضي خان
صبي نصراني زوجه ابوه نصرانية
فاسلمت المراة لايفرق القاضي بينهما
حتى يعقل الصبي الاسلام - فاذا عقل

1. *Mahommedan law Vol. II, P. 432. The Indian Courts have held to the contrary 33 All. 90.*

stand Islam. Then he shall be offered Islam, and if he refuses, the Kazi shall effect separation between them, just as if he had been an adult and refused to accept Islam, separation would have been effected between the husband and wife.''

يعرض عليه الا سلام فان ابى فرق
القاضي بينهما كما لوكان بالغا يعرض
الاسلام عليه فان ابى فرق بينهما -

Ila.

Ila is a survival of the dark ages, and in its "primitive sense, it signifies a vow," and was considered as a divorce, but later on as a divorce suspended for four months. *Ila* takes place when a person swears that he will not have sexual intercourse with his wife for four months. *Ila* must not be for a shorter period.

The Koran mentions *Ila*. Part. II. Ch. II.

"Those who swear that they will not go into their wives, should wait four months. But if they go back then Allah is Forgiving and Merciful."

للذين يولون من نسائهم تربص
اربعة اشهر فان فاؤا فان الله غفوررحيم -

Thus if a person has no connubial intercourse for the period of four months an irreversible divorce takes place independent of the decree of judicial separation. Imam Shafi' considers that a judicial decree is necessary. The Hanafi jurists retort that since the husband acted unjustly towards his wife, it is equitable that on the expiration of four months he should be deprived of the benefit of marriage. *Ila* is generally rescinded by carnal intercourse. But if the wife is at a distance, or is sick, or is incapable of carnal act the husband may orally rescind his *Ila* by saying, "I have returned to that woman." Imam Shafi' holds that *Ila* cannot be rescinded except by sexual intercourse. If a wife is observing *iddat*, and her husband makes *Ila* then whether the term of *Ila* has expired or not, as soon as her *iddat* is terminated *Ila* drops.

Zihar.

Zihar in the literal sense means "the back," in law it signifies a man's comparing or likening his wife to his mother or any female relations within the prohibited degree whether by consanguinity, affinity or fosterage. The usual phrase is "thou art to me as the back of my mother." In archaic times *Zihar* stood like divorce, but the law considers it as a temporary prohibition without dissolving marriage, and it continues till the performance of expiation.

If after *Zihar* cohabitation takes place, nevertheless expiation is incumbent upon the husband.

The Holy Koran says. Part XXVIII Ch. LVIII.

"As for those of you who put away their wives by likening their backs to the backs of their mothers, *let them know* that they are not their mothers, their mothers are no others than those who gave them birth and surely they utter a hateful word and a falsehood and verily Allah pardons and forgives."

الذين يظهرون منكم من نسائهم
ماهن امهاتهم - ان امهاتهم الا اللائى
ولدنهم وانهم ليقولون منكراً من القول
وزورا وان الله لعفو غفورا -

The atonement for *Zihar* consists either of (a) manumission of a slave, (b) fasting for two months, (c) feeding sixty poor persons.

A famous *Hadis* is reported in 'Abu Daud' and in 'Tirmize'. Sulaiman bin Sakhr had made a declaration of *Zihar* on his wife, but before making any expiation he returned to his wife, and mentioned the case to the Holy Prophet who commanded.

"Free a slave", Sulaiman answered, 'I have none', then 'Fast for two successive months.' He said, 'I am not able', then the Prophet said, 'Feed sixty poor persons.' He said 'I have no food for sixty persons.' Then the Holy Prophet said to Ferwah-bin Amer, Give to Sulaiman fifteen *sas* of dates to enable him to feed sixty persons."

الترمذي
فقال له رسول الله عليه وسلم اعتق
رقبة قالا لا اجدها قال فصم شهرين متتا
بعين قال لااستطيع قال اطعم ستين
مسكينا قال لا اجد فقال رسول الله صلى
الله عليه وسلم لفروة بن عمرو اعطه
ذلك العرق وهو مكتل ياخذ خمسة
عشر صاعا ليطعم اوستة عشر صاعا ليطعم
ستين مسكينا -

A wife is entitled to insist on the restitution of conjugal rights, and she can prevent her husband from taking conjugal liberty, till he has made the proper expiation, and if he should refuse then the Kazi will imprison him, and ask him to expiate or repudiate his wife. The Shiah jurists require the presence of two witnesses for a *Zihar* declaration. It is stated that a *Muta* marriage which admit of no divorce (except separation effected by the doctrine of the gift of the term) could be dissolved only by a *Zihar* declaration.[1]

Tafweez-ul-Talak.

The doctrine of Tafweez-ul-Talak or the delegation of the option of repudiation to the wife or to some third party is peculiar to the Muslim law. Historically the doctrine of Tafweez is traced from a revelation purely personal to the Prophet. It is reported in the Muslim. The Prophets' wives were apparently dissatisfied with their lot and craved for wordly comforts. The following revelation

1. *F. B. Tyabji's Principles of Muhammadan Law, P. 113, where Sharaya-ul Islam is cited.*
2. *Hamilton's Hedaya (Grady) P. 67.*

was promulgated by the Koran.

"O Prophet! say to thy wives, if ye desire this wordly life and the pomp thereof, come, I will give you them to enjoy, and I will let you go honourably. But if ye seek God and his Apostle, and the life to come, verily God has prepared for those of you who do good a great reward."

Part XXI Ch. XXXIII.
يا ايها النبي قل لازواجك ان كنتن تردن الحيوة الدنيا وزينتها فتعالين امتعكن واسرحكن سراحاً جميلا - وان كنتن تردن الله ورسوله والدارالاخرة فان الله اعد للمحسنات منكن اجراعظيماً -

A *Hadis* is found in the Muslim.

"The Holy Prophet narrated this revelation to Ayesha and asked her to consult her father. But she declared, "No, I need no consultation I make my choice of God, his Apostle and the last dwelling place."

مسلم
هذا الاية يايها النبي . . . . عظيماً قال فبدا بعائشة فقال ياعائشة اني اريد ان اعرض عليك امرا احب ان لاتعجلي فيه حتى تستشيري ابوبكر قالت وماهو يارسوالله فتلا عليها الا يه قالت افيك يارسوالله استشيرابوي بل اختار الله ورسوله والدا رالاخرة -

According to the jurists *tafweez* تفويض الطلاق is of three kinds.[1]

1. *Ikhtiar*. في الاختيار (choice is yours).
2. *Amer-ba-yad* في الامر باليد (It is in your hands).
3. *Mashiat* في المشية (as you please).

The Hedaya classifies thus: (1). Option, (2) Liberty, (3) Will.[2]

Ikhtiar, option.

The delegation by *Ikhtiar* confers on the wife the option of divorcing herself, but it restricts the exercise of the power to the precise place or situation in which she was the recipient of the option. When a man says, (a) "choose" or (b) "choose *talak*" to his wife, he cannot revoke the option he has given, as long as she is in the same situation, but if she rises up indifferently and betakes herself to some other employment, the option is cancelled. If the option is exercised, then in case (a) a single irrevocable repudiation takes place and in case (b) one revocable repudiation takes place.[3] Similarly if the husband takes conjugal liberty even against her will the option is at an end. The period of option may be extended to a month or a year, e.g., when a man says 'Choose thyself within this month or a year'. The option may be given through a third person. If a man says to another, "Give my wife a choice," or "inform her," then she has no option until he does so but in the latter case she may avail herself on information.

1. *The wife generally reserves the option by a stipulation in the marriage contract.*
2. *Hamilton's Hedaya (Grady) P. 87.* 3. *Beillie's Digest, P. 240.*

The Hedaya says, " In a delegation of Liberty, divorce takes place according to the number mentioned by the wife, independent of the husbands intention, and the divorce which follows is irreversible."[1]

Amer-ba-yad, Liberty.

If a man says to his wife 'thy business is in thy hand,' (it is essential that he should intend divorce by this expression) and the woman answers " I have divorced myself with one divorce," then one irreversible divorce only takes place. Amer-ba-yad like Ikhtiar may be restricted to a particular time, e. g., " Your business is in your hands to-day and tomorrow." This power may be given to a third party e. g. if a man says to another, " My wife's business is in your hands, for a month."

Mashiat is divorce in express terms. If a man says to his wife " Divorce yourself ", and the woman says, " I have divorced myself," then a single reversible divorce takes place. If a man desires his wife to repudiate herself by a reversible divorce, and she divorces herself irreversibly, even then a reversible divorce in accordance with the wish of the husband takes place.

Mashiat, will.

In short there are infinite number of examples found in the texts, and they resemble one another so closely that it is difficult to lay down any general principle. It seems that the legal presumption is that option to repudiate should be exercised immediately or not at all, and that a wife can only divorce herself in conformity with the intention expressed by her husband, that is, she cannot give herself a more complete divorce than the husband intended.

The instances given of delegation to a third party are interesting, e. g. permission to one of two or more wives to divorce a rival wife, permission to the father or other guardian of the wife to cancel the marriage, and a curious instance is that of a debtor permitting a creditor to repudiate his wife. If a creditor says to his debtor, " If you do not pay me my right in a month the business of your wife will be in my hands ", and he has replied, " Let it be so[2]." If the condition happens, the creditor may repudiate the debtor's wife.

If the husband divorces his wife during the death-illness, *marz-ul-maut*, he is suspected of a design to defraud her of inheritance. Such a divorce is treated as a repudiation by a *faar* or evader. Baillie says, that the approved definition of

Divorce in death-illness [3]. *Marz ul-maut.*

1. Hamilton's Hedaya (Grady) P. 89 *2. Baillie's Digest, P. 251*

3. A marriage contracted in death illness is dependent on consummation so that if a man die of that illness without consummation the woman has no right to dower or succession.

death-illness is, "that it is one which it is highly probable will issue fatally, whether in the case of a man, it disables him from getting up for necessary avocations, out of his house or not, such as, for instance, when he is a *fukeeh* or lawyer; from going to the *musjid*, or place of worship; and, when he is a merchant, from going to his shop; and whether, in the case of a woman it does or does not disable her from necessary avocations within doors" [1]. The lame, the paralytic, the consumptive or one suffering from long continance of malady (for a year) are not in the state of *marz-ul-maut*, because there is no immediate apprehension of death.[2] Some jurists apply a curious test that "when a man cannot pray standing, he suffers from death-illness."

The Hedaya says: "If a husband, being in a besieged town or in an army, repudiate his wife by three divorces, she does not inherit of him, in the event of his death, although that should happen within her *Edit*; but if a man engaged in fight or criminal carrying (being carried) to execution were in such situation to pronounce three divorces upon his wife, she inherits where he dies in that way, or is slain: for it is a rule that the wife a *faar* (or evader) inherits of him...........a man who is in a fort or town besieged, or who resides in an army, cannot be said to be in any imminent danger..........whereas one engaged in fight, or carrying to execution, is in circumstances of imminent danger [3]"

Thus the principle of *Marz-ul-maut* seems to be that (1) there must be probable immediate and proximate danger of death, (2) the person himself must be suffering from some degree of apprehension of death, (3) the factum of death-illness must be established by some "external indicia" e. g. inability to attend to necessary avocations. Hence it is an illness which in fact causes death. According to the Hanafi jurists, if a husband on his death-bed repudiates his wife by an irreversible divorce or three divorces, and dies before the expiration of *iddat* then the wife will inherit from him, but if he died after the expiration of *iddat*, she will be excluded from the inheritance. Imam Shafi' held that the wife is not entitled to inherit in either case. He mentions that if the wife dies before her husband then according to the accepted view the husband is not entitled to inherit from her. The Hanafi jurists accept this view, but they distinguish it from the first case saying that the wife was in

1 *Digest P. 552.*

2 *Abdur Rahman's Institutes of Mussalman Law, P. 154 "When a man is on board a ship, tempest tossed and exposed to imminent peril he is placed on the same footing with regard to repudiation as those who are sick."*

3 *Hamilton's Hedaya (Grady) P. 100.*

health at the time of divorce and that "connubial connexion is not cause of inhertance in the husband," and the husband lost his right as he himself manifestly desired so by repudiating his wife.

If the wife abandons Islam during her last-illness, and dies in her *iddat*, her husband is entitled to inherit. If a woman suffering from death-illness enters into *khula* and subsequently dies, the law declares that the gift made by her in consideration of *khula* shall be restored to her heirs.

CONCLUSION

Under the Muslim Law divorce is an arbitrary act of a husband and he may divorce his wife at his pleasure with or without her consent. Divorce may be verbal only and no special expressions are necessary; it suffices, if it denotes a clear intention to dissolve the marriage, and writing is not necessary to the legal validity of divorce. Divorce is either revocable or irrevocable. During the period of *iddat*, the husband may take back his wife, but after the period has elapsed he cannot exercise this right; marriage is deemed to subsist with respect to various of its effects such as maintenance, residence and right of inheritance. The husband can delegate to a third person or to his wife the power to repudiate herself. *Khula* is a repudiation by consent and is at the instance of the wife for a valuable consideration *Mubarat* is a divorce by mutual consent. Judicial separations are technically known as *Tafrik*, they take place for various causes. Divorce during death-illness, *marz-ul-maut* is ineffective. Divorce does not affect a woman whose marriage is *batil void ab initio*. The dissolution of such a marriage is by separation. However divorce is condemned by Islam and it should not be resorted to, unless it has become imperative and absolutely necessary.

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